THE ECCLESIASTICAL LAW.

BY

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AND AUTHOR OF

"THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE."

THE EIGHTH EDITION, CORRECTED;

WITH CONSIDERABLE ADDITIONS:

BY ROBERT PHILIP TYRWHITT, ESQ.

OF THE MIDDLE TEMPLE.

IN FOUR VOLUMES.

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1824.

TO

HIS MOST SACRED MAJESTY,

GEORGE THE THIRD,

BY THE GRACE OF GOD,

KING OF GREAT BRITAIN, FRANCE, AND IRELAND,

DEFENDER OF THE FAITH,

AND OF THE CHURCH OF ENGLAND,

AND ALSO OF IRELAND,

IN EARTH THE SUPREME HEAD.

MAY IT PLEASE YOUR MAJESTY,

A BOOK treating professedly of the law of the church naturally addresseth Your Majesty under your legal title.

However inconsiderable the Author may be in himself, or how imperfect soever his work may be in the execution, he is emboldened to lay the same at Your Majesty's feet, from that regard

which You have manifested in all Your declarations and actions for the subject-matter it contains.

Law is the stability of the throne, and the security of the subjects in all that can be dear to them in this world.

Your Majesty is descended from a race of princes, who made the law of the land the constant rule of their conduct: and their reigns were happy and prosperous.

In these our days, it is the glory of the British nation, that we have a King at our head, who excels every subject he hath in public virtue, love to our native country, reverence for its institutions and laws, and every amiable disposition.

SUPREMACY is a word, which in different ages hath conveyed different meanings.—In the times of our Saxon ancestors, the king was the head and fountain of jurisdiction, as well spiritual as temporal; and the same was exerted in the well governing the whole body of his people, both clergy and laity, according to the laws then in being. Supremacy might then be defined to be, the king's executive power circumscribed by the laws of this kingdom.

In process of time, the bishop of Rome (by

means incredible, if the facts did not evince it) usurped an absolute sovereignty in matters spiritual within this kingdom. Then the supremacy was, the Pope's power to do what he listed without control; either as reason dictated, or his interest guided, or his passions swayed,—I say *usurped;* because it was strenuously opposed by the whole estate of the realm, the king, lords, and commons assembled in parliament. Vigorous laws were enacted; but for a long time they were ineffectual.

At length the papal jurisdiction was abolished, and the king restored to his ancient ecclesiastical dignity and pre-eminence. But the princes of this realm in those days, intoxicated (as it should seem) with that excess of power which the pope had assumed, would needs understand it, that the same was not extinguished, but only transferred from the popes unto themselves: and they carried similar notions into the civil administration. This excited disorders and convulsions in the state, and in the end overturned the government.

After several struggles, the kingdom at last became settled into that regular, uniform, beneficial institution, which shines forth in its full lustre under Your Majesty's auspicious influence, and renders Your Majesty the delight of Your subjects, and the envy of the whole earth.

That Your Majesty may long live to be a blessing to this church and nation, is the hearty prayer of

YOUR MAJESTY's

Most humble, most faithful,

and obliged Servant,

RI. BURN.

TO

THE RIGHT HONOURABLE

WILLIAM LORD STOWELL,

JUDGE OF THE HIGH COURT OF ADMIRALTY,

AND LATE

JUDGE OF THE CONSISTORY COURT OF LONDON,

THIS EIGHTH EDITION

OF

DR. BURN'S ECCLESIASTICAL LAW

IS,

WITH HIS LORDSHIP'S PERMISSION,

MOST RESPECTFULLY INSCRIBED,

BY

HIS LORDSHIP'S OBEDIENT SERVANT,

R. P. TYRWHITT.

ADVERTISEMENT

TO

THIS EIGHTH EDITION.

THE present Edition of Dr. Burn's work has been prepared with the greater attention, on account of the very important acts of parliament and decided cases respecting ecclesiastical law, which have occurred since the former Edition in 1809. For the assertion may be hazarded, that in few, if in any branches of our civil jurisprudence have more material improvements or additions been made within the last few years, than in the ecclesiastical law of England and Ireland. A comparison of the titles *Burial, Charitable Uses, Churches, Curates, Dissenters, Excommunication, First Fruits,* (including Queen Anne's Bounty), *Glebe Lands, Privileges and Restraints of the Clergy, Public Worship, Register Book, Vestry, Wills generally,* and *Wills of Seamen,* and still more particularly of *Marriage, Residence,* and *Tithes,* in this edition, with the same heads in the last, will support this remark.

Great additions have been consequently made to the work; the Statutes being brought down to the end of the session of the 4th of the present King, including the recent acts on the subject of *Marriage;* and all the hitherto published ecclesiastical reports by Drs. Phillimore, Haggard, and Addams, having been analyzed and added to this edition.

These reports, so long the great *desideratum* in legal literature, have been now for the first time classed and compared with cotemporary cases on similar subjects in

the courts of common law and equity. It is hardly necessary to add, that these latter have been also most sedulously analyzed and inserted.

Some MS. notes of cases decided by Sir William Wynne, taken by an eminent civilian, have been also arranged in this edition : nor have the labours of the editor been confined to the later cases; but much useful matter has been collected from the more ancient reports.

The additions thus made are placed partly in the text, in which case they are distinguished from the original matter by inclosure within brackets, or by a different manner of paging ; and partly in the shape of notes, numbered (1), &c. The notes of former editors have been revised, and are referred to by italic letters thus, (*a*), additions to them by the present editor being placed within brackets ; and the MS. notes of the late Mr. Serjeant Hill, annexed to the seventh edition, have been retained.

The text of the original has been carefully preserved, except only where an act of parliament recited in a previous edition has expired or been repealed, or is replaced by another act in this. The notes of Dr. Burn himself are referred to in this edition by a * or †, or by a roman letter, thus [a], &c. The paging of the last edition has been preserved; and the matter for the first time added to the text in this edition is marked with an italic *a*, following the number of the original page.

The titles *East Indies*, *Ireland*, *Scotland*, and *Wales*, have been now first introduced, to shew the general state of ecclesiastical law in those parts of the empire : and the title *Land-Tax* has been added, containing the regulations for its redemption, &c. as affecting church property. From the multitude of cases on *Wills* a selection has been made of those which seemed best to elucidate some general principle laid down in the text : and in the attempted improvement of the title *Tithes*, Mr. Mirehouse's work on this subject has greatly

assisted, and has afforded much useful information in a style of the neatest brevity. The statutes for repeal of the acts against *Witchcraft* in the three kingdoms are now also introduced under that title.

To conclude this brief notice without more particularly alluding to Dr. Haggard's reports of the judgments of Lord Stowell in the consistory court of London, would be unpardonable in the first individual who has incorporated them in Burn's Ecclesiastical Law. His editorial labours became truly irksome when confined, as they necessarily were, to the dry analysis of these singular compositions, which, as uniting the most cultivated taste to the deepest legal acquirement, are out of the usual routine of professional studies.

Where little else than the judicial eloquence of strong reasoning and technical knowledge is attempted or displayed, he has had the arduous but accustomed path of analysis to pursue: but where these most indispensable requisites are retained in their highest perfection, and are yet adorned with every charm of keen wit and polished diction, it was felt impossible to do common justice to the author in the usual course.

To transcribe these judgments at length would be the only but impracticable method fairly to point out their distinguished excellence; and however the Editor may, for his own sake, lament the humbled expression which has too often taken the place of the luminous and eloquent original, the reader will, under every disadvantage, be at no loss to discover

'——— *disjecti membra poetæ.*'

R. P. TYRWHITT.

1, Church Court, Temple.
February 1824.

Dr. *BURN*'s PREFACE.

THE ecclesiastical law of England is compounded of these four main ingredients; the *Civil* law, the *Canon* law, the *Common* law, and the *Statute* law. And from these, digested in their proper rank and subordination, to draw out one uniform law of the church, is the purport of this book.

Where these laws do interfere and cross each other, the order of preference is this: The *Civil* law submitteth to the *Canon* law; both of these to the *Common* law; and all the three to the *Statute* law.

So that from any one or more of these without all of them together, or from all of these together without attending to their comparative obligation; it is not possible to exhibit any distinct prospect of the English ecclesiastical constitution.

I. By the CIVIL law is meant, the law of the ancient Romans; which had its foundation in the Grecian republics, and received continual improvements in the Roman state during the space of upwards of a thousand years, and did not expire at last, even with the empire

For the distinct knowledge whereof, it is to be remembered, that after the abolishing of the regal government at Rome, and the establishment of the republic, they sent three men into Greece to collect the laws of the Athenian and other Grecian states; and from these were compiled and digested by ten commissioners, well known by the name of the *Decemviri*, the laws of the *twelve tables* (so called from their being engraved on twelve tables of brass): which were the first and principal foundation of the Roman law. (*a*)

Duck de Jure Civili Rom. *passim*. Ayliff's Parerg. Strahan's Domat. Harris's Justinian. *In Præfat.* Livii Hist. Rom. *l.* 3. *c.* 22.

(*a*) [It was not till sixty years after the expulsion of the kings, during which time there were continual struggles between the patricians and the people, that three persons were sent to Athens to transcribe the famous laws of Solon, and to learn the manners and

To the twelve tables were added the *Responsa Prudentum*, or interpretation of the lawyers; who ac-

customs of the other states of Greece. *Livy, lib.* 3. § 31. & 33. In this mission they spent three years. From their report, and the then existing laws of Rome, the decemviri compiled ten tables, to which they afterwards added two others; and these were enacted to be law by the whole people. Such were the twelve tables, which Livy has styled the fountain of public and private law, and of which Cicero, *lib.* 1. *De Orat.* says, *Discebamus pueri duodecim tabulas ut carmen necessarium.* The fragments of these laws were collected with great industry by Jacobus Gothofredus, and are to be found, illustrated with notes, at the end of the folio edition of the Corpus Juris Civilis. They are also published, with a commentary by Mr. Pothier, in the first volume of his work, intituled *Pandectæ Justinianeæ in novum Ordinem digesta.*

But as these tables only contained the law under general heads, it became necessary to invent the forms of actions by which individuals might pursue their different rights; which forms, in time, introduced new interpretations of the law itself. The knowledge of these, and of the system of law which flowed from them, was kept as secret as possible by the pontifical college, who appointed members of their own body to preside over the colleges of justice; till Appius Claudius having composed a book on this subject, his scribe *Cneius Flavius* stole and published it, about the year of Rome 340; which present so delighted the people, that they procured for him some of the first honours of the state. The patricians, however, invented new forms, which were a second time divulged by *Sextus Ælius*, about the year of Rome 580. How observant this great people was of solemn form on all occasions, is apparent from the admirable work of Brissonius, *De Formulis,* whose words are, *Nulla vitæ pars, neque publicis neque privatis, neque forensibus neque domesticis in rebus, formulis vacabat.*

There are two sources of the civil law, which, if not properly explained, are apt to excite surprise in the student: These are the *responsa prudentum*, and the *interpretations of the prætors;* for neither the lawyers nor the prætors had the power of making laws, although their influence on the general system of law is so much felt and acknowledged. It may therefore be useful to investigate this subject a little further.

The *jus patronatus*, or that connection which subsisted between a patron and his client, and which is said to have been considered by the ancient Romans as the next strongest tie to parental affection, may be traced to the institution of Romulus. The patricians, a class of citizens chosen by him from the wisest and most powerful members of the state, were regarded as the fathers of the people; and persons of lower rank, as well as cities and corporations, chose from amongst them a patron who managed their public affairs, and undertook the defence of their lawsuits. The client in return promised to assist his patron in marrying his daughters, to redeem him and his children from captivity, to promote his canvass for offices, and, in a word, to render every service in his power. The patricians, to whom the

commodated the same to the use and practice of their courts. And this was denominated, in contradistinction

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knowledge of the law was for a long time confined, discharged their office gratuitously; but when, in process of time, the forms of the law were divulged, and the connection between patron and client became weaker, persons of all descriptions applied themselves to the study of the law, and the lawyers began to give their advice to all alike, and in a more interested manner; so that at last they were seen walking up and down the forum, and even offering themselves to any who might want their assistance. The effect of their labours was, that they produced three new branches of law. 1. They settled the forms and process of the different actions. 2. They decided, either at home or in forensic disputations, difficult questions submitted to them by their clients; and their opinions were respected and adopted by the judges, and in time came to have the force of law. (So great indeed were the learning and abilities of these jurisconsults, that they were frequently consulted by the judges on difficult points, as appears by the *lib.* 2. § 47. *Dig. de Orig. Jur.*) 3. They proceeded a step farther, and endeavoured to introduce new laws where they thought the old defective, which they frequently effected by means of *fictions*, which in time acquired the stability of law. Thus it is to them we owe the *querela inofficiosi testamenti*, by which a testament in some cases was set aside as unjust, although the laws of the twelve tables had given the testator an absolute power of disposing of his property; which was done under pretence that he was not of sound mind. *Dig.* 5. 2. 2. Also the donations between man and wife, which the old law totally forbad, and many other points which Cicero complains much of in his oration against Murena. The *responsa* of Caius, and a consultation of some unknown jurisconsult, are to be found in the learned work of Mr. Schulting, intituled *Jurisprudentia ante — Justinianea.*

As to the prætors, they were expressly said not to have the power of abrogating the old law, but merely of assisting, supplying, and correcting it. *Jus prætorium est quod prætores introducerunt, adjuvandi vel supplendi vel corrigendi juris civilis gratia, propter utilitatem publicam. Dig.* 1. 1. 7. And we find the prætor denying an action in a certain case, *ne contra leges faciat. Dig.* 6. 2. 12. § 4. Yet in fact the decisions of the prætorian law were in some cases directly contrary to the twelve tables; but these were cases where equity required their interference against the strict letter of the law. They perfected this system of equity chiefly by four means. 1. By inventing fictions, as that of the *jus postliminii*, by which a person who returned from captivity was, in order to preserve his civil rights, feigned never to have been absent. 2. By introducing persons and names unknown to the old law: Thus, when they wished to give the possession of a deceased person's property to one who was excluded from the inheritance, they called him *bonorum possessor*, though, in fact, he differed little from an *heir*. 3. They defeated many actions valid by the civil law, by granting exceptions against them, if the transactions on which they were founded were brought about by fraud or fear; and in some cases they granted actions which the civil law denied. 4. By a sen-

to the laws of the twelve tables, the *jus non scriptum*, or unwritten law: and having no other name, begun then to be called the *civil* law; and is that which is styled by *Justinian* the *jurisprudentia media*, because it came in between the laws of the twelve tables and the Imperial constitutions.

Next to these were the *Leges*, or laws emphatically so called; because they were enacted by the whole body of the people, reckoning both the nobility and commonalty together: and this was particularly when a new case happened that was not provided for by the former laws; the consuls on this occasion caused the people to be assembled together, and informed them what the case was, and asking their opinions, that is, putting it to the vote, they decided the same according to the rules of equity as the matter appeared to them; and this decision being made, was ever afterwards in the like

tence called *restitutio in integrum*, they restored the whole business to its former state, as if nothing had been done. See *Heineccii Antiq. Rom. lib.* 1. *tit.* 2. The prætors, as indeed all other magistrates, were attended by a numerous counsel of assessors when they sat in judgment; *Noodt de Jurisdictione, lib.* 1. *cap.* 11 & 12.; and their jurisdiction was much more extensive than that of the ædiles. The fragments of the perpetual edict are collected by Jac. Gothofredus, and are also published by Mr. Pothier in the work above cited.

These innovations of the learned lawyers and the prætors will not surprise those who reflect on the jarring powers which composed the Roman state, which made it more difficult to procure new laws to be enacted by public authority to meet new emergencies, than it is with us to procure an act of parliament. And in truth something of a similar nature has happened in the laws of all nations, and among ourselves. *Plowden*, p. 109., says, "The judges have frequently explained the words (of an act of parliament) entirely contrary to the text, and sometimes have taken things by equity contrary to the text, in order to make them agree with reason and equity." Lord *Hobart* too, p. 346., has the following passage: "If you ask me then, by what rule the judges guided themselves in this diverse exposition of the self-same word and sentence? I answer, it was by that liberty and authority that judges have over laws, especially over statute laws, according to reason and best convenience to mould them to the truest and best use." To our judges we owe the barring of estates tail by the fiction of a recovery, and the modern equitable process in ejectment: Serjeant Moore invented the conveyance by lease and release, to supply the necessity of livery of seisin: The ecclesiastics introduced the doctrine of trusts, to evade the statute of mortmain; and many other similar instances might be adduced.]

cases observed as a law. For after the abolition of the regal government, the magistracy was lodged with the people; one principal branch whereof is the power of making laws.

Afterwards, the common people mutinying, upon some differences with the nobility, retired and separated themselves from the nobility for some time; and during this secession they enacted laws of their own, which were called *Plebiscita;* and upon a reconciliation with the nobility afterwards, it was agreed and consented to, that these also should have the force of law, and be obligatory upon the whole Roman people, the nobility as well as others.

But on the daily increase of the Roman state, it appearing almost impossible to assemble the whole body of the people, at least without some tumult and commotion; it was thought expedient, whenever any new case arose, to trust the senate with this power: And when any new law was made by them, it was styled *Senatus consultum,* or a decree of the senate; and it was, in like manner as the *plebiscita,* incorporated into the Roman civil law.

Furthermore, when the consuls were abroad in the wars, to the end that the city might not be destitute of governors during their absence, the people created for themselves two officers called *Prætors;* and these had power given to them of adding to, or supplying and correcting, the civil law of the twelve tables; and were wont to propound certain edicts, which being approved by the people were incorporated into the civil law, and were called *Jus prætorium,* or the prætorian edicts.

Also the *Ædiles curules* in some cases did establish laws; but as their office, so also their edicts, were but for the year; and therefore at first they were called *annual edicts,* until the time of the Cornelian law, which made them perpetual, and thenceforth they were called *perpetual edicts.* These were digested and put into order by Salvius Julianus, under the emperor Adrian, and illustrated by the commentaries of the Roman lawyers.

These were the component parts of the Roman civil

law, whilst their state continued republican. After the government was transferred into the hands of the Emperors, two other branches were added, to wit, the *Constitutiones principum*, or Imperial constitutions, and the *Responsa prudentum*, or answers of the lawyers.

For after the administration was, by the *lex regia*, granted by the people to Augustus; whatsoever the emperor ordained by his epistle, or commanded by his edict or proclamation, or decreed on the cognizance of any matter coming before him in judgment, had the force of a law, under the style and title of an *Imperial constitution.* And these constitutions were sometimes called *placita principum*; because they were such as the prince or emperor was pleased to ordain according to his discretion.

Next to the Imperial constitutions, were the *Responsa prudentum* under the emperors. The *Responsa prudentum*, during the times of the republic, were delivered without the sanction of public authority, and made part (as was said) of the *jus non scriptum*: But under the emperors after Augustus, no person was suffered to deliver answers concerning the law, but those to whom the emperors gave commission; and to their answers the judges were obliged to conform. And these do constitute a part of the *jus scriptum*, or written law.

The Imperial constitutions aforesaid, in the space of five hundred years, from Augustus to Justinian, grew to so immense a bulk, that the lawyer *Gregorius* thought fit to make a digest thereof, from the time of Adrian, or (as others say) of Augustus, down to the reign of Dioclesian; and this he did by his own private authority; and from him the *Gregorian code* had its name and original.

The second code which we read of was that of *Hermogenes*, who lived in the age of the Constantines; wherein were comprised all the Imperial constitutions of Claudius, Aurelius, Probus, Carus, Carinus, and that vast number of constitutions made by Dioclesian and Maximian.

The next code was that of the emperor *Theodosius* the younger, who caused the same to be compiled after

the manner of the foregoing codes; containing the constitutions of the emperors from the time of Constantine down to Theodosius's own reign; and this collection from him was called the *Theodosian code.*

But in these three codes there was nevertheless so much confusion, contradiction, and superfluity, that Justinian judged a revisal and correction thereof to be very necessary.

And therefore from these three codes of the Imperial constitutions, and also from such new constitutions as had been made and published after the compiling of the Theodosian code, the emperor Justinian [about the year 533] caused a new code to be compiled [by Tribonian and others], which from him was denominated the *Justinian code.* Which code he afterwards caused to be revised and corrected in many particulars, and republished; and is that code which we have now extant at this day.

After which he caused in like manner the *responsa prudentum,* consisting of some hundred volumes of the writings of the Roman lawyers, to be digested and abridged; and this he called the *Digest* or *Pandect,* as containing all the decisions collected from the questions and resolutions of the ancient Roman lawyers.

And from this digest or pandect, and likewise from his own code, and other commentaries of the ancient lawyers, he caused also his book of *Institutes* to be compiled; which containeth the elements of the Roman law, written in an elegant and easy flowing style.

Last of all he published his *Novels;* which Novels (*novellæ*) were new constitutions made by Justinian himself after the publication of the other books; and these are sometimes called the *Authentics,* to distinguish them from some other publications of constitutions of the succeeding emperors, which are not respected as of much authority. And generally, the whole civil law in use at this day is comprised in those four books of Justinian; the *Code,* the *Digest,* the *Institute,* and the *Novels.*

The greatest part of this island was governed wholly by the civil law for about three hundred and sixty years,

from Claudius to Honorius; during which time, some of the most eminent Roman lawyers, as Papinian, Paulus, and Ulpian, whose opinions and decisions are collected in the body of the civil law, did sit in the seat of judgment in this nation. (*b*) But after the declension of the Roman empire, the Saxon, Danish, and Norman customs took place.

Nevertheless, in aftertimes, the same law again came to be of great repute within this kingdom; particularly during all the time from the reign of king Stephen [commencing in A. D. 1135] to the reign of king Edward the third [A. D. 1376, 1377] both inclusive. (1) During which period, and at other times, according as the study of the civil law prevailed, the judges and professors of the common law had frequent recourse to it, in cases where the common law was either totally silent or defective. And thus we see in the most ancient books of the common law, as Bracton, Thornton, and Fleta, that the authors thereof have transcribed, one after another, in many places, the very words of Justinian's Institute.

And there are some particular matters in which the civil law hath always been, and still is allowed to be, the only law in England whereby they are to be decided; and the courts of justice which have cognizance of those matters, do proceed therein according to the rules and forms of the civil law.

Thus in the high court of *admiralty* (which was established about the time of king Edward the first), all causes civil and maritime are to be decided according to the civil law, and the maritime customs.

Thus in the court of honour or *chivalry*, the lord high constable and earl marshal, who are the judges thereof, are to proceed according to the civil law, as being the most proper law for deciding all controversies

(*b*) *Duck, lib.* 2. *cap.* 8. *pars secunda,* § 7.

(1) For a copy of the Pandects or Digests had, in 1130, been found at Amalfi in Italy; which accident, concurring with the policy of the Roman ecclesiastics, suddenly gave new vogue and authority to the civil law, introduced it into several nations, and occasioned that mighty inundation of voluminous comments with which this system of law, more than any other, is loaded. 1 *Bla. Comm.* 81.

arising upon contracts made in foreign countries, deeds of arms and of war out of the realm, and things that pertain to wa within the realm, and other matters whereof that court hath the proper cognizance.

So also in the two *universities:* the courts which are there held for determining suits to which the scholars or members of the universities are parties, do proceed according to the rules of the civil law.

The courts of *equity* also are in many things conformable to the rules of the civil law; of which the chief is, the high court of *chancery.* There suits are commenced by petition or bill; witnesses privately examined; and nothing is there determined by a jury of twelve men, but all the decisions are made by the chancellor. And almost all the chancellors, from Becket to Wolsey, that is to say, from the age next after the Conquest until the age of the Reformation, comprehending almost the whole time of the pope's domination within this realm, were ecclesiastics well skilled in the Roman laws.

And, finally, in all the *ecclesiastical courts* within this kingdom, although the canon law is the foundation of their proceedings, yet the canon law being in a great measure founded upon the civil law, and so interwoven with it in many branches thereof, that there is no understanding the canon law rightly without being very well versed in the civil law; the knowledge thereof is therefore absolutely necessary for the dispatch of all causes of ecclesiastical cognizance. And the civil law not only serves to explain the canon law; but by the practice of all ecclesiastical courts, it is allowed to come in aid of and to supply the canon law, in cases which are there omitted. And how necessary and useful the civil law is in this respect, doth evidently appear from the commentaries of Lindwood and of John de Athon upon the provincial and legatine constitutions. (2)

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(2) In all these courts the reception of the civil and canon laws is general, and the different degrees of that reception are grounded entirely on custom, corroborated in the instance of the universities by act of parliament, 13 *Eliz.* c. 29. ratifying those charters which form their customary law. Thus, in the first place,

The courts of common law have the superintendency over these

Duck de Jur. Civ. Romanor. Ridley's view of the Civil and Eccl. Law. Ayliff's Parergon.

II. The CANON law sprung up out of the ruins of the Roman empire, and from the power of the Roman pontiffs. When the seat of the empire was removed to Constantinople, many of the European princes and states fell off from the dominion of the emperors; and Italy amongst the rest. And the bishops of Rome, having been generally had in esteem as presiding in the capital city of the empire, began to set up for themselves, and by degrees acquired a temporal dominion in Italy, and a spiritual dominion throughout Italy and almost all the rest of Europe. (*c*)

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courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and in case of contumacy, to punish the officer who executes, and, in some cases, the judge who enforces the sentence so declared to be illegal.

2. The common law has reserved to itself the exposition of all such acts of parliament as concern either the extent of their courts or the matters depending before them; and therefore if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

3. An appeal lies from all these courts to the king in the last resort, which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate or intrinsic authority of their own. And from these three strong marks and ensigns of superiority it appears beyond a doubt, that the civil and canon laws, though admitted in some cases by custom, in some courts are only subordinate, and *leges sub graviori lege;* and that thus admitted, restrained, altered, new-modelled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical laws. 1 *Bla. Comm.* 83, 84.; and see 3 *Bla. Comm.* 102, 103.

(*c*) The origin of the canon law is almost coeval with Christianity; for it seems to be agreed that the apostles of our Saviour framed certain regulations for the government of the church, which were called κανωνες, or *rules*, to distinguish them from the *laws* enacted by the secular authority, although the learned have differed as to the authenticity of the *Canons of the Holy Apostles*, which are to be found both in the *Corpus Juris Civilis* and *Juris Canonici.* These rules were explained and enlarged by several councils of the church; and *Justinian*, in *Nov.* 131. *cap.* 1., gives the force of law to those established by the four councils mentioned by our author. From this time various collections of these canons are said to have been made; by Dionisius Exiguus in the reign of Theodoricus and Justinian, by Isodorus in the seventh century, by Burchardus in the eleventh, and Ivo in the begin-

And thereupon the several princes and states did willingly receive into the body of their own laws, the canons of councils, the writings of the holy fathers, and the decrees and constitutions of popes.

Concerning the *canons of councils*, it was established by Justinian himself, that the canons of the councils of Nice and of Constantinople, of the first council of

ning of the twelfth century. But Gratian, having retired into a monastery for that purpose in 1127, produced, after the labour of twenty-three years, a work which greatly excelled those of his predecessors, but which being still defective in some respects, was referred to a council of cardinals and other learned men, and published by Gregory XIII. (who was cotemporary with our Elizabeth), under the title of the *Decret.* (See the *Pref. of Gregory.*) This work consists of three parts. The first contains one hundred and one distinctions, the second thirty-three causes, and the third five distinctions, on the subject of Consecration. Interpreters, in quoting this work, generally cite the first words of the canon, omitting the number of it, which renders it necessary for the modern reader to refer to the alphabetical index of the canons, which will direct him to the division and subdivision of the Decret where any particular canon is to be found. The Decretals are also frequently cited in the same way. The necessity of composing these arose partly from the omissions of Gratian, and partly from the subsequent decrees and epistles of the pontiffs. Of these it seems there were no less than five different collections, from which Gregory IX. ordered his chaplain *Raymund* to compose the Decretals, which were published in the year of Christ 1230. (Vid. *Præf. ad Decretal.*) References to these are most frequently marked with the letter X. for *extra;* these and the subsequent parts of the *Corpus Juris Canonici* being reckoned extraneous, and termed the *wings* of the Decret; whence arose that saying, *Male cum rebus humanis actum esse ex quo decretis alæ accesserunt.* Duarenus *in Præf. de Sacr. Eccl. Minist.* To these Boniface VIII. added the sixth Decretal, which is always quoted as such, or thus, *in* 6°. It consists of five books, to which are added the Regulæ Juris. Then follow, as our author says, the Clementines, collected by Clement V., but published by his successor John XXII. in 1317; and the Extravagants of John XXII. published in 1325. The Institutes were compiled by the order of Paul IV., but were never publicly acknowledged by the popes, as appears from the preface of the author. This is a work of great merit. A subsequent collection of the Decretals of different councils was published by Mathews, a French lawyer, in 1661, which is to be found in some editions of the *Corp. Jur. Can.*, but which also was never recognized by the see of Rome. The reader will find much information on this subject in a work of Professor Bockelman, *De Differentiis Juris Civilis Canonici et Hodierni*, which has been illustrated by the notes of different learned men, and was published at Utrecht in 1737; also in the Introduction to *Ayliff's Parergon*, though the author seems to have been much out of humour with the papal law. See also the first part of the *Decret, dist.* 16. *et seq.*

Ephesus, and of the council of Chalcedon, should be observed for laws; and that their decrees, as to matters of faith and doctrine, should be esteemed even as the holy scriptures.

After Justinian, the authority of canons made in general or provincial councils, and of the writings of the fathers, still prevailed; and the decision of ecclesiastical controversies, which could not be drawn from the councils and the fathers, was sought for from the Roman pontiffs, who writ answers to those that consulted them, in like manner as the Roman emperors; and their determinations were called *rescripts* and *decretal epistles*, and obtained the force of laws.

More particularly, of the canon law there are two principal parts, the *Decrees* and the *Decretals.*

The *Decrees* are ecclesiastical constitutions, made by the pope and cardinals, at no man's suit. These were first collected by *Ivo,* in the year 1114. And afterwards polished and perfected by *Gratian,* a monk of Bononia, in the year 1149, [and generally known by the name of *Decretum Gratiani.*]

The *Decretals* are canonical epistles written by the popes alone, or by the popes and cardinals, at the instance or suit of some one or more, for the ordering and determining of some matter in controversy; and have the authority of a law in themselves.

Of the decretals there are three volumes. The first [in five books] collected by order of *Gregory* the ninth, about the year 1231. The second [volume and sixth book] by *Boniface* the eighth, about the year 1298. The third made by pope *Clement* the fifth, and from him called the *Clementines,* and published by him about the year 1308.

To these may be added the *Extravagants* of *John* the twenty-second, and of some other bishops of Rome, whose authors or collectors are not known, and are as *novel* constitutions unto the rest.

So that the popes did the same in the church, which Justinian did in the empire; they took order to have Gratian's decrees published in the manner of the *Pandect;* the decretal epistles, like as the *Code;* the Ex-

travagants in the nature of Justinian's *Novels*; and that nothing might be wanting, Paul the fourth ordered an *Institute* of the canon law to be written by John Lancellot, which was added to the body of the canon law, printed at Rome under Gregory the thirteenth.

There were also as many commentators on the canon, as on the civil law.

And thus both the civil and canon laws became in some considerable degree received throughout all Christendom; affording mutual help and ornament to each other. (3)

And the rule in interpreting them was this: If a case happened, which was either not at all determined in the civil law, or not expressly, but doubtfully and obscurely, and the same was plainly and clearly delivered in the canon law; the decision thereof was taken from the canon law: And on the contrary, where in the canon law there was no direction, or the same was ambiguously or obscurely expressed; the decision thereof was taken from the civil law: And if in any case the civil and canon laws did interfere, and were contrary to each other; the civil law was to be observed in the civil law courts, and the canon law in the canon law courts; the civil law within the emperor's dominions, and the canon law within the pope's dominions. And in the courts of civil law, where a matter of canon law cognizance came in question, the same was there determined according to the rules of the canon law; and in the courts of canon law, where a matter of civil law cognizance came in question, the same was determined according to the rules of the civil law. (*d*)

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(3) See note (2).

(*d*) See *Duck de Jur. Civ. lib.* 1. *cap.* 7. § 11 & 12. Although the first regulations of the church were modestly called canons, or rules for the government of the members of the church, in time the popes assumed the power of giving to their decrees and decretal epistles the force of law, and of abrogating the Imperial code when it contradicted their doctrines. Thus we read in the *Decret* (*dist.* 10. *c.* 1.) *Lex Imperatorum non est supra legem Dei sed subtus. Imperiali judicio non possunt ecclesiastica judicia dissolvi*; and (*ib. cap.* 4.) *Constitutiones contra canones et decreta præsulum Romanorum, vel bonos mores, nullius sunt momenti.* On this head the expression of Clement V., when he dissolved the order of Templars, is memorable

And particularly, that the canon law in many instances was received here in England, appeareth clearly from hence; namely, for that very many of the decretal epistles of the popes are directed hither, upon controversies arising in this nation. (*e*)

Besides the foreign canon law; we have our *legatine* and *provincial* constitutions.

The *Legatine constitutions* were made and published within this realm in the times of *Otho*, legate of Gregory the ninth; and of *Othobon* (afterwards pope Adrian the fifth), who was legate here to Clement the fourth: And these are illustrated by the learned comment of *John de Athon*.

These legatine constitutions did extend equally to both provinces; having been made in *national* synods or councils, held here by the respective legates, [in the reign of Henry III., about the years 1230 and 1268.]

The *Provincial constitutions* were made in convocation in the times of the several archbishops of Canterbury from *Stephen Langton* to *Henry Chicheley;* containing the constitutions of those two archbishops, and of the several archbishops intermediate, to wit,

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Licet hoc de jure non possumus, volumus tamen de plenitudine potestatis. Cro. Ja. 518. These stretches of power made the pope justly unpopular with our common lawyers, so that lord *Hobart* (p. 146.) says that he was at one time *demon meridianus.* Yet Calvin's Lexicon, *voc. Canon. Jus,* which refers to authorities, and which gives the rules stated by the author in this paragraph, says, that the canon law is acknowledged and taught in the states of those princes who adopt it, not because it is enacted by the Roman pontiff, but as a law of their own received by consent, and acquiring the force of custom, in matters which are agreeable to reason and piety, and not contradictory to the divine law. *Illud (jus) in provinciis principum ac statuum evangelicorum usurpatur ac docetur non ut a pontifice Romano profectum, sed ut jus proprium libero consensu receptum* in vim consuetudinis *iisque in rebus quæ rationi ac pietati conveniunt, neo divino juri adversantur.* He adds two other rules: 1. That in matters of a feudal nature, the civil is preferred to the canon law. 2. That in forensic causes the canon law is not presumed to differ from the civil.

(*e*) That the canon law does not bind except it be received here, but that when received it becomes a part of the law of the land; see bishop *Gibson's* Introductory Discourse to his *Codex*, p. xxvii. who refers to *Sir W. Jones*, 160., *Palm*, 458., *Vaugh.* 21. & 132. See also our author, in tit. Courts, 16.]

Richard Wethershed, *Edmund* of *Abingdon*, *Boniface*, *John Peccham*, *Robert Winchelsey*, *Walter Reynold*, *Simon Mepham*, *John Stratford*, *Simon Islepe*, *Simon Langham*, *Simon* of *Sudbury*, and *Thomas Arundel*. These were collected and adorned with the learned gloss of *William Lindwood*, official of the court of Canterbury, and afterwards bishop of St. David's in the reign of king Henry the fifth. Which constitutions, although made only for the province of Canterbury, yet were received also by the province of York in convocation, in the year 1463.

There were other constitutions of divers prelates, both before and after; but these which have been mentioned, having been introduced to public notice by the two learned canonists above named, have been principally regarded.

Concerning this whole body of the canon law, it is enacted by the statute of the 25 *Hen.* 8. *c.* 19. as followeth: Where divers constitutions, ordinances, and [25 *H.* 8. *c.* 19.] canons provincial or synodal, which heretofore have been enacted, be thought not only to be much prejudicial to the king's prerogative royal, and repugnant to the laws and statutes of this realm, but also over-much onerous to his highness and his subjects; the king's humble and obedient subjects, the clergy of this realm, have most humbly besought the king's highness, that the said constitutions and canons may be committed to the examination and judgment of his highness, and of two and thirty of the king's subjects, whereof sixteen to be of the clergy of this realm, and all the said two and thirty persons to be chosen and appointed by the king's majesty; and that such of the said constitutions and canons, as shall be thought and determined by the said two and thirty persons or the more part of them worthy to be abrogated and annulled, shall be abolite and made of no value accordingly; and such other of the same constitutions and canons, as by the said two and thirty or the more part of them shall be approved to stand with the laws of God, and consonant to the laws of this realm, shall stand in their full strength and power, the king's most royal assent being first had and obtained to the

same: And forasmuch as such canons, constitutions, and ordinances, as heretofore have been made by the clergy of this realm, cannot now at the session of this present parliament, by reason of the shortness of time, be viewed, examined, and determined, by the king's highness and two and thirty persons to be chosen and appointed according to the petition of the said clergy, in form above rehearsed; it is therefore enacted, that the king shall have power to nominate and assign at his pleasure the said two and thirty persons of his subjects, whereof sixteen to be of the clergy, and sixteen to be of the temporalty of the upper and nether house of the parliament; and if any of the said two and thirty persons so chosen shall happen to die before their full determination, then his highness to nominate others from time to time of the said two houses of parliament, to supply the number of the said two and thirty; and that the same two and thirty, by his highness so to be named, shall have power and authority to view, search, and examine the said canons, constitutions, and ordinances provincial and synodal, heretofore made; and such of them as the king's highness, and the said two and thirty or the more part of them, shall deem and adjudge worthy to be continued, kept, and obeyed, shall be from thenceforth kept, obeyed, and executed within this realm, so that the king's most royal assent under his great seal be first had to the same; and the residue of the said canons, constitutions, and ordinances provincial, which the king's highness and the said two and thirty persons or the more part of them shall not approve, or shall deem and judge worthy to be abolite, abrogate, and made frustrate, shall from henceforth be void and of none effect, and never be put in execution within this realm: "*Provided, that such canons, constitutions, ordinances, and synodals provincial, being already made, which will not be contrarient or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the king's prerogative royal, shall now still be used and executed, as they were afore the making of this act, till such time as they be viewed, searched, or otherwise or-*

"*dered and determined by the said two and thirty*
"*persons, or the more part of them, according to the*
"*tenor, form, and effect of this present act.*" (4)

And by the 27 *Hen.* 8. *c.* 15. Forasmuch as the canons cannot by reason of the shortness of the time be examined during this session of parliament; the king shall have power to nominate the two and thirty persons, sixteen of the clergy, and sixteen of the laity, either before or after the dissolution of the parliament; whose power shall continue for three years after the dissolution. [27 *H.* 8. c. 15.]

And by the 35 *Hen.* 8. *c.* 16. The said power was continued to the king during his life, and by the same statute it was enacted more generally, as follows: "Un-
"til such time as the king and the said two and thirty
"persons have accomplished the effects and contents
"before rehearsed; such canons, constitutions, ordi-
"nances, synodal or provincial, or OTHER ECCLESIAS-
"TICAL LAWS OR JURISDICTIONS SPIRITUAL, as be yet
"accustomed and used here in the church of England,
"which necessarily and conveniently are requisite to
"be put in ure and execution for the time, not being
"repugnant, contrarient, or derogatory to the laws or
"statutes of the realm, nor to the prerogatives of the
"regal crown of the same, or any of them, shall be
"occupied, exercised, and put in ure for the time,
"within this realm; and that the ministers, and due
"executors of them, shall not incur any damage or
"danger for the due exercising of the aforesaid laws,
"so that by no colour or pretence of them, or any of
"them, the minister put in ure any thing prejudicial
"or contrary to the regal power or laws of the realm;
"any thing whatsoever to the contrary of this present
"act notwithstanding."

But the design was not completed in that king's reign.

In the reign of king Edward the sixth, this matter

(4) So from the preamble to 25 *Hen.* 8. *c.* 21. it appears that the then reserved canons bound the laity; for that act, and 35 *Hen.* 8. *c.* 16., continue the force of canons accustomed and used: "And here," says lord *Hardwicke*, "rests the ecclesiastical power." *Strange's Reports*, 1060.

[3 & 4 *Ed.* 6. *c.* 11.] was again set on foot; and by the 3 & 4 *Ed.* 6. *c.* 11. it was enacted, that the king should have power for three years, to appoint sixteen of the clergy, whereof four to be bishops, and sixteen of the temporalty whereof four to be learned in the common law, to compile such ecclesiastical laws as aforesaid, not being repugnant to the common law or statutes of this realm.

And hereupon king Edward the sixth directed a commission to thirty-two persons; and afterwards appointed a sub-committee of eight persons, to prepare the work, and make it ready for the rest, that it might be dispatched with the more expedition. Which said eight persons were, archbishop Cranmer, Dr. Goodrich bishop of Ely, Dr. Cox the king's almoner, Peter Martyr doctor in divinity, William May and Rowland Taylor doctors of law, John Lucas and Richard Goodrich esquires; by whom the work was undertaken, digested, and fashioned, according to the method of the Roman decretals, and called by the name of *Reformatio legum ecclesiasticarum;* the style whereof was corrected and perfected by Dr. Haddon and sir John Cheek. But the king dying soon after, the royal confirmation thereof was not obtained.

In the reign of queen Mary, all the aforesaid acts were repealed, by the statute of 1 & 2 *P. & M. c.* 8. And so the matter rested till the first year of queen Elizabeth, when by the statute of 1 *El. c.* 1. § 10. the aforesaid act of the 25 *Hen.* 8. *c.* 19. was revived, and extended to the queen, *her heirs and successors,* (the rest of the afore-mentioned acts still remaining repealed.)

In pursuance of which revival and extension, it was proposed in convocation, in the fifth year of queen Elizabeth, to move the queen's majesty in that behalf, and afterwards, by the endeavours of archbishop Parker, it was set on foot in the parliament of the 13 *Eliz.*, and by a leading member recommended to the consideration of the house of commons; but after that, we hear no more of it. (5)

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(5) The *Reformatio Legum* is a work of great authority in determining the *practice* of the times when it was compiled, whatever may

So that by 1 *El. c.* 1. § 10. until such reformation as aforesaid shall take effect, the canon law, so far as the same was received here before the said statutes, and is not contrarient to the common law, nor to the statute law, nor to the prerogative royal, is recognized and enacted to be in force by authority of parliament. Therefore the business upon this head must be, to inquire, first, what is the canon law upon any point; and then to find out how far the same was received here before the said statute; and then to compare the same with the common law, and with the statute law, and with the law concerning the king's prerogative (which is also part of the common law): and from thence will come out the genuine law of the church.

Under this head concerning the canon law, are to be reckoned also the constitutions and canons made in the convocation of the province of Canterbury, in the year 1603; and ratified by the king, for himself, his heirs, and successors: Which were also received and passed, about two years after, in the province of York.

Concerning the authority of these canons, and consequently the power of the convocation to make laws (with the royal assent and approbation), much dispute hath been made; but the matter seemeth now to be finally settled in the case *Middleton* and *Croft*, *M.* 10 *Geo.* 2. (6), in which lord *Hardwicke*, then lord chief justice of the king's bench, delivered the resolution of the court to this effect: "One question in this cause is, "whether the makers of the canons of 1603 had a "power to bind the laity. They were made by the "bishops and clergy in convocation convened by the "king's writ, and confirmed by him under the great "seal; but the defect objected to them is, that they

Strange's Rep. 1056, 2 Atkyns's Rep. 650.

be its correctness in matters of law. See lord *Stowell's* judgment in *Hutchings and another* v. *Loveland*, 1 *Hagg. Rep.* 179.

(6) It was there solemnly decided on the principles of law, and the constitution, that where the canons of 1603 are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity; and see *Matthews* v. *Burdett*, *H.* 1 *Ann.* K. B. 2 *Salkeld*, 412.

" were never confirmed by parliament, and for this " reason, though they bind the clergy of the realm, " yet they cannot bind the laity for want of a parlia- " mentary confirmation. And some of the counsel in " their argument seemed to admit it, by putting the " case upon the foot of the ancient canon law; but as " the other counsel who argued on that side did not " give it up, it is become necessary to examine and " determine a point of so great moment to the consti- " tution of England, in order to settle the law there- " upon. And on the best consideration we have been " able to give it, we are all of opinion, that the canons " of 1603, not having been confirmed by parliament, " do not *proprio vigore* bind the laity; I say *proprio* " *vigore*, by their own force and authority; for there " are many provisions contained in these canons, which " are declaratory of the ancient usage and law of the " church of England, received and allowed here, " which, in that respect, and by virtue of such an- " cient allowance, will bind the laity; but that is an " obligation antecedent to, and not arising from, this " body of canons. They who look into *Spelman*'s " Collection, will find much matter in the ancient " councils, that may serve for illustration and orna- " ment; but as those were often mixed assemblies, " composed partly of clergy, and partly of laymen; " sometimes the king with his nobility, at other times " some of the commons likewise, are mentioned as " present. But whether they had suffrages in these " councils or not, and in what manner they were sent " thither, whether by election, or by what other kind " of constitution, is very uncertain and obscure. The " like may be said of several councils held in the ear- " liest times following the coming in of the Norman " line; and afterwards there is a frequent mixture of " the legatine authority which arose merely by papal " usurpation.

" Upon this important question, therefore, it is proper " for judges to proceed upon surer foundations; which " are, the general nature and fundamental principles " of our constitution, acts of parliament, and resolu-

"tions and judicial opinions in our books; and from
"these to draw our conclusions.

"No new law can be made to bind the whole people
"of this land, but by the king, with the advice and
"consent of both houses of parliament, and by their
"united authority. Neither the king alone, nor the
"king with the concurrence of any particular number
"or order of men, hath this high power. The bind-
"ing force of these acts of parliament arises from that
"prerogative, which is in the king our sovereign liege
"lord; from that personal right which is inherent in
"the peers and lords of parliament, to bind themselves
"and their heirs and successors in their honours and
"dignities; and from the delegated power vested in
"the commons as representatives of the people; by
"reason of this representation, every man is said to
"be party to, and the consent to every subject is in-
"cluded in, an act of parliament.

"But in canons made in convocation, and confirmed
"by the crown only, all these requisites are wanting,
"except the royal assent; there is no intervention of
"the peers of the realm, nor any representation of the
"commons.

"It was said indeed by some of the civilians in this
"cause, that, even in parliament, there is not an actual
"representation of all orders and degrees of men,
"there being more subjects who do not vote in elec-
"tions, than who do. But that doth not make it cease
"to be a representation. It was impossible that all
"could join in the election; and therefore our con-
"stitution hath fixed it in those who are possessed of
"the most valuable and fixed sort of property. A
"notion also was advanced in this argument, that the
"parson represents the parish: But how can that be,
"when we all know, that the parson is not elected by
"them? The writ is to summon to convocation the
"whole *clergy*; and the premonition is, that arch-
"deacons and deans shall come in person, and the
"rest by their representatives. These shew plainly
"that the clergy only are called, and that the proctors
"are chosen to represent the clergy only. Hence

"arises the distinction between canons made in "ancient councils confirmed by the empire after it "became Christian, and those made here. The em-"peror, according to Justinian and the Digest, had "a legislative power; and when they received his "confirmation, they had their full authority. But "that is not the case here: the crown hath not the "full legislative power: and it is therefore rightly "said in 2 *Salk.* 673, that the king's consent to a "canon *in re ecclesiasticâ* makes it a law to bind the "clergy but not the laity: And no one can say, that "the consent of the people is included in the royal "confirmation. Another argument is, that by our "constitution the power of imposing taxes is co-exten-"sive with the power of making new laws. The par-"liament lays taxes upon all the people; but the "clergy never pretended to tax any but themselves. "And it seems almost an absurdity to say, that when "the clergy in convocation cannot charge the laity "with one farthing by way of tax or imposition, "cannot even create a new fee to be paid by them, "yet that the clergy should have it in their power to "enact new laws, for disobeying which, the laity shall "incur the penalty of excommunication, which is to "be carried into execution by the loss of their liberty, "and a disability to sue for and dispose of their per-"sonal estates. This would certainly be to affect the "laity in their property in a very high degree; and "yet it is admitted, that the clergy by synodical acts "cannot charge the property of the laity.

"In all the acts of parliament since the reformation, "for confirming forms of prayer and other ecclesias-"tical constitutions, the preambles shew, that the "clergy in convocation were only considered as the "proper assembly to prepare and propound them, but "not to enact or give them their force. It was ob-"jected indeed in this argument, that the confirmation "in parliament did not give being to them as laws, to "bind the laity; but was designed merely to inforce "them by the addition of temporal penalties. But "that is not the only reason, though it is one. The

"true use of these confirmations in parliament was, "the extension of such constitutions over the laity, "who would otherwise not be bound. It hath also "been said, that at least they should bind the laity *in* "*re ecclesiasticâ.* — But this proves a great deal too "much; there are many things of an ecclesiastical "nature, which no canon can touch, as the case of "tithes, the degrees of consanguinity, and the opera-"tion of administrations; and if this argument would "hold, they might overturn the common law as to the "heirship of lands, and the division of personal estates; "which would never be endured, for these are matters "which have always been regulated by the legislature." And after considering the cases which had been alleged on both sides, he concludes upon the whole, and lays it down as the deliberate resolution of the whole court, that the canons of 1603 do not *proprio vigore* bind the laity.

In the aforesaid case, the point was not in question, whether or how far the said canons are obligatory upon the clergy. It seemeth generally to be understood, that they are binding in that respect. And it is to be observed, that there are very many particulars in those canons, which are taken from the ancient canon law received here before the said statute of the 25 *Hen.* 8. [*c.* 19. and *c.* 21. *supra*, note (4).] And therefore upon this head, it is to be inquired, how much of those canons is agreeable to the ancient canon law, and how much is added of new by the convocation of 1603: for in the former case, the same will be obligatory both upon the clergy and laity; and in the latter case, upon the clergy only. (7)

Yet there seemeth to be one exception to this general

(7) In *Middleton* v. *Crofts*, lord *Hardwicke* cited the opinion of lord *Holt*, and declared that it was not denied by any one, that it is very plain that all the clergy are bound by the canons confirmed by the king only (see 2 *Atk. Rep.* 605.), and cases cited *arguendo*, 2 *Salk. Rep.* 673. Thus, a clergyman who married a couple out of the parishes in which the man and woman reside, was liable to penalties for breach of the canons before the statute 26 *G.* 2. *c.* 33.; for the canons must be pursued with the utmost exactness by ecclesiastical persons. *More* v. *More*, 2 *Atk. Rep.* 158.

rule; and that is, with respect to those officers of the ecclesiastical court which are laymen, as registers, proctors, and apparitors (and we may add also churchwardens, who are officers attendant on the courts of visitation, there to give information of offences); for as to these, the temporal courts in the adjudications which have been made, do proceed upon a supposition that these canons are in force. But according to the foregoing doctrine, the distinction must be this: that the regulation of the officers according to the measures prescribed by these canons, is not so much of necessity as of convenience; that the canons in these respects are a good rule to go by, but not of peremptory obligation; and therefore that the authority which the court exerciseth over its officers according to these canons, is not from the canons themselves, but from that power which every court hath over its own officers, by the common law, by the ancient canon law, and by every law; for without this, there could be no courts at all.

Hale's Hist. Com. Law. 3 Co. 10 Co. Pref.

III. The COMMON law is so called, because it is the common municipal law or rule of justice throughout the kingdom. For although there are divers particular laws, some by custom applied to particular places, and some to particular causes; yet that law, which is common to the generality of all persons, things, and causes, and hath a superintendency over those particular laws that are admitted in relation to particular places or matters, is the common law of England.

This is usually called *lex non scripta* (*g*); not as if all those laws of which it consisteth were only oral, or communicated from the former ages to the latter merely by word; for all those laws have their several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty; for as the civil and canon laws have their canons, decrees, and decretal determinations in writing, so those laws of England which are not com-

(*g*) *Scribere leges* is in truth γραφειν νομους, to enact laws. The *lex non scripta* is therefore that law which derives its force from custom, not from positive enactment.

prized under the title of acts of parliament, are for the most part extant in records of pleas, proceedings, and judgments, in books of reports and judicial decisions in tractates of learned men's arguments and opinions, preserved from ancient times, and still extant in writing: but they are styled *unwritten laws*, because their authoritative and original institutions are not set down in writing in that manner, or with that verbal explicitness, that acts of parliament are; but they are grown into use, and have acquired their binding power and the force of laws, by a long and immemorial usage, and by the strength of custom and reception in this kingdom; the matter, indeed, and the substance of those laws, are in writing, but the formal and obliging force or power of them grows by long use and custom. For custom generally received in this kingdom, obtains the force of law; and is that which gives power sometimes to the canon law, and sometimes to the civil law, in the respective courts wherein they are in use; and again, controls both, when they cross other customs that are generally received in the kingdom.

As to the rise and original of this common law, it is to be understood, that after the decay of the Roman empire, this nation was invaded by several different people; each of whom, more or less, introduced their own laws in the places where they settled. When the kingdom became united under one monarch, the several laws were collected and formed into one general law of the realm.

Alfred, who was the first sole monarch after the Saxon heptarchy, about the year 896, collected all the laws into one book, and commanded them to be observed throughout the whole kingdom, which before only affected certain parts thereof.

After him, *Edward the confessor*, who began his reign in the year 1041, out of the former laws composed a system which he called the *common law*; upon which account he is styled by our historians, the restorer of the English laws.

Afterwards, *William the conqueror*, with the advice of his council, on consideration of all the laws and cus-

toms, abrogated some, and established others: to which he added some of his own country laws, which he judged most to conduce to the preservation of the peace.

William Rufus, his son, broke through the ancient laws and customs which his father had established. But the conqueror's next son, king *Henry the first*, surnamed *Beauclerk*, from his eminent learning, abolished all the evil customs which his brother had introduced, and restored the laws of Edward the confessor, with those amendments which his father had made by the advice of his barons.

The next succeeding kings, in like manner, confirmed all the aforesaid laws and customs, and enacted new laws as occasion required, by the advice and consent of the great council of the realm; the original records of which being lost, they remain only now as parts of the common law.

For we have no original or authentic transcripts of acts of parliament, ancienter than the reign of king Henry the third. But undoubtedly such there were. And many of those things that we now take for common law, were originally acts of parliament, though now not to be found of record. And if in that next age, the statutes made in the time of Henry the third and Edward the first should be lost, yet even those may possibly in future times pass for parts of the common law; and, indeed, by long usage, and the many resolutions grounded upon them, and by their great antiquity, they seem even already to be incorporated with the common law: and that this is so, may appear, though not by records, for we have none so ancient, yet by authentic and unquestionable history, wherein a man may, without much difficulty, find that many of those matters which are now used and taken for common law, were enacted in parliament or great councils before the reign of king Henry the third. But yet, those constitutions and laws being made before time of memory, do now obtain, and are taken as part of the common law and immemorial customs of the kingdom; and so they ought now to be esteemed, though in their original they were acts of parliament.

And this common law hath been committed to writing, and delivered down to the present times, in the works of divers learned men.

Particularly, the famous and learned *Glanvil*, lord chief justice in the reign of king Henry the second, wrote a book of the common law, which is said to be the most ancient composition on that subject now extant.

Bracton, who was a judge in the reign of king Henry the third, wrote a very learned treatise of the common law, towards the latter end of that king's reign; which is held in great estimation to this day.

Britton, who, as some say, was bishop of Hereford, or, as others say, was a judge (and perhaps he might be both), in the times of king Henry the third, and king Edward the first, composed a learned work on the common laws of England, which was published in the fifth year of king Edward the first.

The book called *Fleta*, was written by some learned lawyer, who being committed to the prison of the Fleet, had leisure to compile it there, and therefore styled it by the name of the Fleet. The author therefore is unknown; but it appeareth in his book that he lived in the reigns of Edward the second and Edward the third.

And from these, and other books of the common law, and from original records and other authentic monuments, that great lawyer, *Sir Edward Coke*, afterwards lord chief justice of the king's bench, in the reign of king James the first, composed his four books of Institutes, which are deservedly esteemed as most valuable repositories of the common law.

Under this head concerning the common law, are to be considered also *Judicial decisions*, or determinations in the courts of justice. Which, although by virtue of the laws of this realm they bind as a law between the parties thereto, as to the particular case in question, until reversed by writ of error; yet do not make a law properly so called (for that only the king and parliament can do): yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is; especially when such decisions hold

a consonancy and congruity with resolutions and decisions of former times.

Of these decisions, in the temporal courts, there are abundant instances in the books of reports; but of cases adjudged in the ecclesiastical courts, no collection hath been published; which hath been one cause why the law and practice of those courts is not so generally understood.

Hereunto may be added also the *Register of writs*: which writs, although they are not strictly law, yet being compiled with the utmost caution and judgment, by the most eminent and experienced sages of the law, are deservedly esteemed as of very great authority.

IV. The STATUTE law is made by the king, the lords spiritual and temporal, and commons, in parliament assembled; that is, by the united suffrages of the whole kingdom, either in person or by representative. And this is that which gives unto acts of parliament their strength and superiority above all other laws in this kingdom whatsoever; by virtue whereof they control, alter, mitigate, repeal, revive, explain, amend, both the common, canon, and civil laws, and actually have done so in abundance of instances. (8) These statutes or

(8) The acts of uniformity, &c. since the reformation, shew that parliament from that period have been of opinion, that the power of making constitutions in ecclesiastical matters to bind the whole nation is in them; and it is clear from 25 *H.* 8. *c.* 19., that both the king and the clergy thought it necessary to have the authority of the parliament for abrogating part of the ancient canons, and establishing such part as was to remain in force. *Middleton* v. *Crofts*, 2 *Atk. Rep.* 659. 661. But an affirmative statute, simply giving remedy at common law for a thing before recoverable in the spiritual court only, does not take away the jurisdiction of the latter. *The King* v. *Sanchel*, 1 *Lord Raym.* 323. Express words only will oust the ecclesiastical jurisdiction. *Gibs. Cod.* 1028. *Thompson* v. *Tapp*, *MSS. Cas.* 17. Thus a statute altering the nature of the offence, and inflicting a new penalty, has that effect, *The King* v. *Sanchel*. So the stat. 7 & 8 *W.* 3. *c.* 35. does not take away the ecclesiastical jurisdiction as to a husband clandestinely married; for he may be punished by ecclesiastical censure, as for an offence against the public order of the church; but it inflicts a penalty on a clandestine marriage, as a fraud on the public revenue, *Middleton* v. *Crofts*, 2 *Atk. Rep.* 671. Again, the statute

acts of parliament bear date (as was observed before) from the reign of king Henry the third; and new statutes have been enacted in every king and queen's reign since that time, except only during the short reign of king Edward the fifth. By which means, in the space of upwards of 500 years, they have necessarily become very numerous, and not a little confused; so that there is need of another Justinian to revise and digest them.

Under this head, we are also to reckon the *Thirty-nine articles* of religion, agreed upon in convocation, in the year 1562; and, in like manner, the *Rubrick* of the book of common prayer: which being both of them established by act of parliament, are to be esteemed as part of the statute law.

THESE are the constituent parts of the English ecclesiastical law, as practised and exercised in the ecclesiastical courts, and in the courts of common law. But besides these, there are other courts which in many instances have concurrent jurisdiction, and in which indeed most ecclesiastical matters of considerable consequence are now usually determined, namely, the courts of *equity*, in the exchequer, and in the chancery. In these are cognizable matters of tithes and moduses for the same, causes matrimonial and testamentary, and other things relative thereunto, as appointing of guardians, ordering executors and administrators, taking care of the interests of infants, payment of debts and legacies, and many other such like. And in these courts the determinations are made according to the rules of equity and good conscience; and more especially they take cognizance in cases where no provision, or not sufficient

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18 *Eliz. c.* 3. inflicts temporal punishment on mothers, &c. of bastards, to prevent undue charges on parishes. The ecclesiastical court punishes them by penance, it being a public scandal to the church; and therefore it has never been imagined that the one has repealed the other. See the words of lord *Coke* in *Cawdry's* case, 5 *Rep.* V. *b.* The distinction, that the spiritual courts proceed only *pro salute animæ* of the offender, and the temporal punish him either in body or purse, is a distinction without a difference, except when the ecclesiastical censure is for a criminal act, and the temporal penalty for a fraud. *Middleton* v. *Crofts*, *M.* 1736, 2 *Atk. Rep.* 673.

provision, is made by the ordinary course of law; and sometimes they will mitigate the rigour of the common law, where by circumstances there happens to be a peculiar hardship or inconvenience in the particular case in question; but, ordinarily, they will not determine against the known and established maxims of the common law, much less relieve against an act of parliament, for that cannot be altered but by the same authority which established it.

As to what is delivered concerning the thirty-nine articles above, it is to be observed, that what is alledged from thence in the following book is inserted, not as a matter of doctrine, but as matter of law; points of doctrine being foreign to the author's whole design.

In like manner, in delivering matters of law, the author taketh not upon him to censure or approve this or that regulation or establishment; it being his province to inquire, not what the law ought to be, but what it is: and he hopeth that the few observations which will occur, will appear not to be strained or impertinent deductions, but naturally resulting from the undeniable evidence of facts.

It sometimes happeneth that the same law falleth in under different titles. In which case, that each title may be as it were a compact treatise within itself, it is judged proper to insert that law under those several titles: repetition in such case being more eligible, than referring the reader to other parts of the book; as it is better to shew a man the way, than to send him elsewhere for information.

In citing authorities, the author hath deemed it indispensable to attribute to every man what is his own; having often observed, not without some degree of indignation, authors of great name borrowing from others without acknowledging the debt. Therefore he acknowledgeth his vouchers upon all occasions, of what credit soever they may be; endeavouring at the same time, not to lay more burden upon any one than he can very well bear; but proportioning his authorities according to the difficulty and importance of the points to be

discussed; not vouching authors of less eminent distinction, for positions of very great moment; nor thinking it needful to multiply authorities in points not controverted, where the first author hath delivered the law, and others only have copied after him.

A work composed of such a variety of materials, cannot in any respect be satisfactory, without searching the foundations; consequently, it hath been endeavoured to represent not only the law, but the history of that law, in its several gradations, from its first beginning under the Christian emperors till its arrival in England; from thence, during the Danish and Saxon periods to the Norman conquest; from the Norman conquest to the reformation; and from the reformation to the present time.

In like manner it might be curious, and withal not difficult to any person well skilled in ecclesiastical history, to trace out the several peculiar *doctrines* (not to be found in the Holy Scriptures) which are or have been professed from time to time by different sects and denominations of Christians. (9)

It is to be lamented, that amongst the professors of the civil and canon law on the one hand, and of the common law on the other, so little of candour is to be found; inasmuch that it may be laid down as one good general rule of interpretation, that what a common lawyer voucheth for the church, and a canonist or civilian voucheth against it, it is for that very reason of so much the greater authority.

Contrary judgments, according to the different measures of right in the several courts, are another cause of regret. And not seldom the determinations in the same court have been various. For though truth is still the same, yet the apprehensions of men concerning it are different. And this must unavoidably, so far, be the parent of uncertainty.

One thing further is to be noted, that in all the books of this kind there is a distasteful intermixture of Latin

(9) See *Evans's* Sketch of the Sects and Denominations of the Christian World.

and English throughout; occasioned by the Roman civil and canon laws (and in conformity thereunto our own provincial and legatine constitutions) being written in the Latin tongue. These the author hath taken the liberty to exhibit in an English literal translation; judging it no more reasonable to preserve in these the Latin diction, than in reciting the ancient statutes and authorities of the common law to preserve the original French.

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TABLE

OF THE

ACTS of PARLIAMENT cited in the first seven Editions; specifying the Titles under which they are inserted in the Work.

NOTE. *The Acts cited in the Additions and Notes of the* present *Edition are placed* infra.

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9 H. 3. c. 13. advowson.
9 H. 3. c. 14. privileges and restraints of the clergy.
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13 Ed. 1. st. 1. c. 19. wills.
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25 H. 8. c. 6. buggery.
25 H. 8. c. 14. oaths.
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25 H. 8. c. 16. chaplains' residence.
25 H. 8. c. 19. appeal. arches. convocations. oaths. peculiar.
25 H. 8. c. 20. bishops. first fruits and tenths.
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12 An. st. 2. c. 9. stamps.
12 An. st. 2. c. 12. [Repealed as to curates by 57 G. 3. c. 99. § 1.]
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1. W. & M. St. 1. c. 8. advocate.
3 W. & M. c. 9. s. 6. benefit of clergy.
6 & 7. W. 3. c. 6. register book
13 & 14 W. 3. c. 6. advocate.

ANNE.

10 An. c. 11. church of united parishes; repairs.

GEO. I.

1 G. 1. St. 2. c. 13. advocate.

GEO. II.

9 G. 2. c. 5. witchcraft.
9 G. 2. c. 26. advocate.
27 G. 2. c. 20. tithes.

GEO. III.

4 G. 3. c. 16. s. 1. wills, infant trustees, or mortgagees in Duchy of Lancaster, counties Palatine or Wales.
12 G. 3. c. 43. Ely house. bishops.
13 G. 3. c. 58. gaols (*addenda*).
21 G. 3. c. 53. marriages.
22 G. 3. c. 64. s. 12. gaols (*addenda*).
26 G. 3. c. 84. bishops.
31 G. 3. c. 32. advocate.
35 G. 3. c. 111. charitable uses.
39 & 40 G. 3. c. 98. Wills. Thelluson's act.
41 G. 3. (U. K.) c. 109. tithes on inclosed commons.
42 G. 3. c. 69. colleges.
42 G. 3. c. 116. land-tax.
43 G. 3. c. 58. bastards. benefit of clergy.
44 G. 3. c. 77. marriages.

GEO. IV.

A

TABLE

OF THE

CASES CITED IN THE FIRST SEVEN EDITIONS.

NOTE. A Table of the Names of the Cases cited in the Additions and Notes of the present Edition, follows *infra.*

☞ *The Roman Numerals denote the Volume respectively, and the Figures express the Page of the sixth Edition, which is preserved in the Margin of the present, for convenience of Reference.* — n. *refers to the Notes.*

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TABLE

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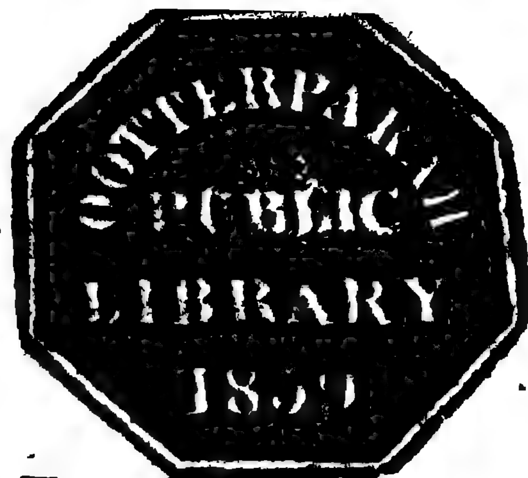
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THE

ECCLESIASTICAL LAW.

Abbot.

ABBOT is a word of oriental extraction, from the Syriac *Abba*, father; as that, from the Hebrew *Ab*, of the same signification: and, if we may ascend still higher, that word itself (as many others which occur in that language) proceedeth from the voice of nature: being one of the most obvious sounds, to express one of the first and most obvious ideas.

The general law concerning abbies and other religious houses, is inserted under the title **Monasteries**.

Abeyance.

ABEYANCE, from the French *bayer*, to expect, is that which is in expectation, remembrance, and intendment of law. By a principle of law, in every land, there is a fee simple in some body, or else it is in *abeyance*; that is, though for the present it be in no man, yet it is in expectancy belonging to him that is next to enjoy the land. 1 *Inst.* 342.

Thus if a man be patron of a church, and presenteth a clerk to the same; the fee of the lands and tenements pertaining to the rectory is in the parson: but if the parson die, and the church becometh void, then is the fee in *abeyance*, until there be a new parson presented, admitted, and inducted. [*Litt. sect.* 647.] For the frank tenement of the glebe of a parsonage, during the time the parsonage is void, is in no man; but in *abeyance* or expectation, belonging to him who is next to enjoy it. *Terms of the Law*, 6. (*a*)

Accession day. See **Holidays.**

(*a*) By presentation and institution the new incumbent acquires a *freehold* in the parsonage, but the *fee-simple* of the parsonage is

Acolyth.

ACOLYTH, *acolythus*, ακόλουθος, in our old English called a *colet*, was an inferior church servant, who next under the subdeacon waited on priests and deacons, and performed the meaner offices of lighting the candles, carrying the bread and wine, and paying other servile attendance. *Kennet's Paroch. Antiq.* Gloss. v. Acolyth.

Administration.

THE administration of intestate's effects, being connected in many particulars with the law concerning last wills and testaments; the whole is treated of together under the title **Wills.**

Admission. See **Benefice.**

Adultery. See **Lewdness.** **Marriage**; tit. XI. Divorce.

Advocate.

1. LINDWOOD says, that by the civil law none could be advocate, but he who had studied for five years. *Lind.* (edit. Oxon.) 76. (*b*)

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neither in the parson or patron, but in perpetual abeyance; and the reason why by the common law they might, with the consent of the ordinary, grant a rent-charge out of the glebe, was, that the grant bound the patron and his heirs, and the ordinary and his successors. *Litt. s.* 648. Bishops and abbots were supposed to have a possession *in fee*, but parsons were considered to have no more than an estate *for life*. *Co. Litt.* 341. But in some respects they had a qualified fee; for before the 13 *Eliz.* where parson, patron, and ordinary made a lease for years, there being a previous grant of the next avoidance, and the presentee of the grantee was inducted, and died, it was held that, by entry upon the parsonage, he was seised in his demesne so as to avoid the lease, not only for himself but his successor, the next presentee of the patron. *Cro. Car.* 582. *Hob.* 7. 7 *Co.* 7. Earl of *Bedford's* case. Though bishops held in fee, their grants, and those of other sole corporations, required confirmation to bind their successors. See titles **Leases** and **Glebe Lands.**

(*b*) *Cod.* 2. 7. 11. *Proem. Dig.* By the civil law, advocates who undertake the defence of causes are directed to be sworn on the holy evangelists in each individual cause, "That to the utmost of their power and ability, omitting no possible exertions, they will endeavour

But this is mitigated, by a constitution of archbishop *Peckham*, to three years: by which it is enjoined, that none shall be permitted to exercise the office of advocate, unless he shall have been for three years at least a diligent hearer of the canon and civil law. And he shall give proof of this by his own oath, if the same shall not appear by proper testimony, or by the notoriety of the fact. *Lind.* 75.

Generally, by the usage and practice of England and other countries at this day, a person may be admitted to this office, who has taken a doctor of laws degree. *Ayl. Parerg.* (2d edit.) 54. (*c*)

By the statute of the 3 *J. c.* 5. no *recusant convict* shall practise in the civil law as advocate. § 8.

[By 55 *G.* 3. *c.* 184. *Schedule*, Part the First, *tit.* ADMISSION, every admission of any person to act as advocate in any eccle- Admission.

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to procure for their client a just and true decision of their suit: that they will not, knowingly and contrary to conscience, patronize any cause which they shall find to be wicked, desperate, or supported by falsehood; but that if in the course of the proceedings they shall make such a discovery, they shall withdraw themselves entirely from the conduct of it. *Cod.* 3. 1. 14. All causes come under one of the following descriptions: They are either manifestly just, notoriously unjust, or of a doubtful nature. The rule with regard to those of the first class, is to defend them by just and fair means only. As to causes of the second class, as it is culpable in the parties to prosecute them, it is of course more so in the advocate to support them. Causes of a doubtful nature, whether the doubt arise from an uncertainty of the fact or law, may be conscientiously defended by the means which are proper for the defence of a just cause." *Domat. Civ. Law*, by *Strachan*, vol. ii. p. 595. 2d edit. *Huber. Prælect. ad Pand.* 3. 1. Very different however is the opinion of *Albertus Magnus*, who wrote in the 13th century, as cited in 1 *Black. Com.* p. 21. "The wisdom of an advocate," says he, "is manifested in three things, namely, by carrying every point: 1. against a just and wise judge; 2. against an astute and sagacious adversary; 3. in a desperate cause."

(*c*) *H.* 47 *Geo.* 3. *The King* v. *The Archbishop of Canterbury.*— In this case an application was made to the Court of K. B. for a mandamus to the Archbishop, to issue his fiat to the vicar-general of the province of *Canterbury*, for the purpose of making out a rescript under the seal of the vicar-general, commanding the dean of arches to admit Dr. *Highmore* as an advocate in the court of arches. Dr. *Highmore* had taken his doctor of laws degree at *Cambridge*, and the fiat was refused, because he had been admitted into deacon's orders. [See the Canon.] Lord *Ellenborough* C. J. "There ought in all cases to be a specific legal right as well as the want of a specific legal remedy in order to found an application for a mandamus. Nothing appears to shew that Dr. *Highmore* has any legal right to what he claims, more than any other of his majesty's subjects, therefore we cannot interfere." 8 *East's Rep.* 213.

siastical or admiralty court in England is charged with 50*l.* stamp duty, except where an advocate admitted in one court in England, is admitted advocate in any other court in England.

By statutes 13 & 14 *W.* 3. c. 6. § 2, 3.; 1 *G.* 1. *st.* 2. *c.* 13. § 2., and 9 *G.* 2. c. 26. § 3., every person acting as advocate in any court in *England*, *Wales*, or *Berwick*, shall, in six calendar months after admission, take and subscribe the oaths of allegiance and abjuration, and the assurance, in one of the courts of Chancery, King's Bench, Common Pleas, or Exchequer, or at the general or quarter sessions of the county, city, or place where he resides. *Qu.* if he may take these oaths before a single judge sitting in bail court under 57 *G.* 3. *c.* 11. See 1 *G.* 4. *c.* 55. § 4. The oath of supremacy seems also necessary to be taken. 1 *W. & M. st.* 1. *c.* 8. § 3. See 5 *El. c.* 1. § 5. By 7 *J.* 1. *c.* 6. § 12. the oath of allegiance shall be taken by advocates before the bishop of the diocese; and see § 3. *Quære*, if Roman Catholic advocates in ecclesiastical courts in *England*, are within the benefit of 31 *G.* 3. *c.* 32. § 22., relieving Catholic barristers, &c. from taking oaths of allegiance, supremacy, and abjuration, and subscribing the declaration against transubstantiation, on taking and subscribing the oath and declaration therein contained. See *infra*, POPERY XXXV. *Tyrwhitt and Tyndale's Digest of the Statutes*, tit. OATHS. And 33 *G.* 3. *c.* 44. Roman Catholic relief act in *Scotland*.]

Oath. 3. *Otho.* He who desireth to be promoted to the office of advocate generally, shall make oath before the diocesan where he was born or doth inhabit, that in the causes which he shall [4] undertake he will perform the part of a faithful patron, not to pervert or delay justice to the adverse party, but by defending the cause of his client by law and reason. Also in matrimonial causes and elections he shall not be admitted to plead, unless he will take the like oath particularly therein; nor in other causes before an ecclesiastical judge shall he be admitted for a longer space than three terms without such oath, unless it be in behalf of his own church, or for his lord, or known friend, or for a poor man, a stranger, or person in misery. And all who shall act contrary hereunto, shall be *ipso facto* suspended from their office until they shall make competent satisfaction, and shall be otherwise duly punished upon conviction of their offence. *Athon.* (edit. Oxon.) 70.

And by a constitution of *Othobon*: No person shall be admitted to be advocate in any cause, unless he shall first produce a certificate of the said oath being made from the diocesan before whom he was sworn, or shall take such oath again. *Athon.* 123. (*d*)

(*d*) There is a constitution of the same prelate *ne clerici advocati sint in causis secularibus.* *Ath.* 91.

His office in general.

4. *Can.* 130. For the furtherance and increase of learning, and the advancement of civil and canon law; it is ordained, that no proctor exercising in any of the archbishop's courts, shall entertain any cause whatsoever, and keep and retain the same for two court days, without the counsel and advice of an advocate, under pain of a year's suspension from his practice: neither shall the judge have power to release or mitigate the said penalty, without express mandate and authority from the archbishop.

And by *Can.* 131. No judge in any of the said courts shall admit any libel or any other matter, without the advice of an advocate admitted to practise in the same court, or without his subscription; neither shall any proctor conclude any cause depending, without the knowledge of the advocate retained and fee'd in the cause: which if any proctor shall do or procure to be done, or shall by any colour whatsoever defraud the advocate of his duty or fee, or shall be negligent in repairing to the advocate and requiring his advice what course is to be taken in the cause; he shall be suspended from all practice for the space of six months, without hope of being thereunto restored before the said term be fully complete.

In case of inhibitions.

5. *Can.* 96. No inhibition shall be granted out of the archbishop's court, at the instance of any party, unless it be subscribed
by an advocate practising in the said court; which the said [5]
advocate shall do freely, not taking any fee for the same, except the party prosecuting the suit do voluntarily bestow some gratuity upon him for his counsel and advice in the said cause: the like course shall be used in granting forth any inhibition at the instance of any party by the bishop or his chancellor against the archdeacon, or any other person exercising ecclesiastical jurisdiction. And if in the court or consistory of any bishop there be no advocate at all; then shall the subscription of a proctor, practising in the same court, be held sufficient.

Suborning witnesses.

6. *Otho.* All advocates shall take care that they do not suborn witnesses by themselves or by any other, or instruct the parties either to suggest what is false or suppress the truth. And all who shall act contrary hereunto, shall be *ipso facto* suspended from their office until they shall make competent satisfaction, and shall be otherwise duly punished upon conviction of their offence. *Athon.* 70.

Advowson.

[See Appropriation, Benefice, Simony, Union.]

Foundation of the right of advowson.

1. THE right of advowson, or of presenting a clerk to the bishop, as often as a church becomes vacant, was first gained by such as were founders, benefactors, or maintainers of the church; either by reason of the foundation, as where the ancestor was founder of the church; or by donation, where he endowed the church; or by reason of the ground, as where he
[6] gave the soil whereupon the church was built. 1 *Inst.* 119. (*e*) 17. *b.* [2 *Wils.* 183.]

For although the nomination of fit persons to officiate throughout the diocese was originally in the bishop, and in no other, yet when lords of manors were willing to build churches, and to endow them with manse and glebe, for the accommodation of fixed and residing ministers, the bishops on their part (for the encouragement of such pious undertakings) were content to let those lords have the nomination of persons to the churches so built and endowed by them; with reservation to themselves of an intire right to judge of the fitness of the persons so nominated. And what was the practice, became in process of time the law of the church. *Gibs.* (2d edit.) 756. (*g*)

(*e*) The right of advowson is given by Mr. J. *Blackstone* in his *Commentaries*, as an instance of an incorporeal hereditament, of which no bodily possession can be had, but which exists solely in contemplation of law. Vol. ii. p. 21. *Co. Lit.* 17. *a.* Advowsons are of two sorts, *appendant*, and *in gross*. When annexed to a manor or land, so as to pass with them, they are said to be appendant: when they exist as personal rights, independent of any manor or land, they are said to be in gross. *Co. Lit.* 120. Another division is, that they are either *presentative*, *collative*, *donative*, or *elective*. *Ibid.* 119. *b.* In an advowson presentative, the patron presents the parson to the ordinary to be instituted and inducted in his church [if he finds him canonically qualified]: in an advowson collative, the bishop is both patron and ordinary; [and by the act of collation does the whole that is done in common law by presentation and institution, see Benefice]: in a donative, the patron puts the clerk in possession without any presentation to the ordinary. See Donative. For elective benefices, see title Cathedrals.

(*g*) This custom was authorized by *Justinian* in *Nov.* 57. *cap.* 2. We also read in *Nov.* 123. *c.* 18. *Ει τις ευκτηριον οἶκον κατασκευασει, και βεληθειη εν αυτω κληρικες προβαλλεσθαι, η αυτος η οι τετε κληρονομοι; ει τας δαπανας αυτοι τοις κληρικοις χορηγησεσι, και αξιες ονομασεσι, τες ονομασθεντας χειροτονεισθαι.* *If any one erect a church, and wish that he himself or his heirs should appoint the clerks, if they furnish a living for the clerks and name proper ones, they shall constitute those persons clerks whom they shall name.* [See also *Nov.* 26. *c.* 12. *s.* 2. *Nov.* 118. *c.* 23.] So in the Decretal, 3. 38. 25. *Si quis ecclesiam cum assensu diœcesani construxit, ex eo jus patronatus acquirit.*

They were called *advocati* and *patroni*, because they were bound to protect and defend the rights of the church, and their clerks, from oppression and violence. *Gibs.* 757.

2. The right of nominating, which at first was annexed to the person building or endowing the church, became by degrees appendant to the manor in which it was built. For the endowment was supposed to be parcel of the manor, and the church was built by such lord for the use of the inhabitants of this manor; and the tithes of the manor were also annexed to the church. Upon all which accounts it was most natural for the right of advowson (which was now become hereditary) to pass with the manor, or with such part of it as might at any time be granted or aliened together with the advowson: To which (whether to the whole, or part) it is therefore said to be appendant; that is, to the demesnes, which are of perpetual subsistence, but not to rents or services, which (though parcel of the manor) may be extinguished, and cannot therefore support such appendancy. [7] *Gibs.* 757. *Wats. c.* 7. (*h*)

Advowson appendant.(1)

If he that is seised of a manor, to which an advowson is appendant, grants one or two acres of the manor, together with the advowson; the advowson is appendant to such acre; especially after the grantee hath presented. *Wats. c.* 7.

But this feoffment of the acre with the advowson ought to be by deed, to make the advowson appendant; and the acre of land and the advowson ought to be granted by the same clause in the deed: for if one having a manor with an advowson appendant, grant an acre parcel of the said manor, and by another clause in the same deed grants the advowson; the advowson in such case shall not pass as appendant to the acre: but if the grant had been of the intire manor, the advowson would pass as appendant (*i*). So if an husband seised in right of his wife of a manor to which an advowson is appendant, doth alien the manor by acres to divers persons, saving one acre; the advowson shall be appendant to that acre. Or if a lessee for life of a manor to which an advowson belongs, alien one acre, with the advowson appendant, the advowson is thereby appendant to that acre. *Wats. c.* 7.

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(1) Advowson appendant to a manor is when it has always passed by a grant of the manor *cum pertinentiis*, 33 *H.* 6. 4. *b.* So it may be appendant to so many acres of land. *Semb. Dy.* 24. *b.* or to one acre. 1 *Rol.* 231. *l.* 20—50. 33 *H.* 6. 5. *a.*

(*h*) *Co. Lit.* 122. *a. Dy.* 70. *b.* Other instances, *Com. Dig.* Advowson. (B.)

A church in one county may be appendant to a manor in another. 33. *H.* 6. 4. *b.* And if a manor extends to divers parishes, several advowsons may be appendant to the same manor. *Com. Dig. tit.* Advowson. (A.)

(*i*) *Per Shelly, Dy.* 48. 2.

An advowson of a vicarage may be appendant to a parsonage, as being derived and endowed out of the same. (1) Upon which account it is, that if a parson be patron of a vicarage, and doth lease the parsonage to another, the patronage of the vicarage shall pass as incident thereunto. And upon the same account, the rector of common right is ever esteemed patron of the vicarage, though by some ordinance, or composition, or by the king's grant, it may be appointed and settled otherwise. (2) And so may even an advowson of a vicarage be appendant unto other things, as to a manor, by reservation upon the appropriation, because the advowson of a rectory was appendant thereunto; as also by the grant of the parson, before the time of memory. (3) And in this case, although the act of appropriation be not extant, yet the use of presenting time out of mind is a sufficient evidence of the appendancy to the manor, contrary to the common right. *Wats. c.* 7. (*k*)

Advowson in gross.

[8]

3. The right of advowson, though appendant to a manor, castle, or the like, may be severed from it; and being severed, [by legal conveyance,] is become an advowson in gross, [or at large, and is for the future annexed to the person of its owner, and not to his manor or lands. (4)] And this may be effected divers ways: As, 1. If a manor or other thing to which it is appendant is granted, and the advowson excepted. (5) 2. If the advowson is granted alone, without the thing to which it was appendant. (6) 3. If an advowson appendant is presented to by the patron, as an advowson in gross. *Gibs.* 757.

[An advowson having thus become in gross can never be appendant any more, except when the act which made it in gross is totally avoided. (7) The] disappendancy may thus be temporary; that is, the appendancy, though turned into gross, may return: As [1. by recovery after an usurpation (8), or by determination of a particular estate to which an advowson was appendant, but which the reversioner by usurpation made in gross. (9)]. 2. If the advowson is excepted in a lease of a manor for life; during the lease it is in gross; but when the lease ex-

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(1) *Dyer*, 350. *b.*
(2) *Sherley* v. *Underhill*, *Moor*, 894. *Gibs.* 758.
(3) *Moor*, 894. *Sherley* v. *Underhill* and another, 1 *Ld. Raym.* 200. So an advowson may be appendant for a moiety or a part, and in gross for another part. *Dyer*, 78. *b.* So it may be appendant for one turn and in gross for the other. *Co. Lit.* 122. *a.* Again, if two advowsons, one appendant and the other in gross, are united, it will be appendant for one turn, in gross for the other. *Dyer*, 259. *b.*
(*k*) *Moor*, 894. *Dy.* 350. *b.* (4) 2 *Bl. C.* 22. 1 *Leon.* 26.
(5) *Dyer*, 103. *b.* (6) *Perk. Grant. s.* 104.
(7) 2 *Bla. C.* 22. 1 *Leon.* 26. (8) *Hobart*, 140.
(9) *Elvis*'s case, *Hob.* 323., relied on, 1 Lord *Raym.* 302.

pires, it is appendant again: 3. If the advowson is granted for life, and another infeoffed of the manor with the appurtenances; in such case the reversion of the advowson passeth, and at the expiration of the grant, it shall be appendant (*l*): 4. If the advowson is allotted to one coparcener, and the manor to another, and she who had the advowson dies without issue, it is appendant again: and so if the demesnes are allotted to the one, and the services to the other, the advowson becomes in gross; but if the one die without issue, and the manor descend to her who had the services, the advowson becomes appendant, as it was before (*m*): 5. If tenant in tail aliens some part of the manor with the advowson, and the alienee grants the advowson to a stranger; or if a *common person* (1) hath an advowson appendant, and a stranger *presents* (2) his clerk, who is in by six months (3); in both these cases, the advowson is made disappendant; but yet, if in the first case the land aliened is recovered by tenant in tail, and in the second case the rightful patron recovers, the appendancy returns (*n*): 6. Where an advowson is appendant to a manor, and the owner mortgages the manor in fee, excepting the advowson, by this means it is become in gross; but if the money be paid punctually at the day, then it is become appendant again, and if it is paid after the day, it is appendant in reputation, and may pass by the name of an advowson appendant, in a grant or other conveyance, though in reality the appendancy is destroyed; for if it is severed one instant from the manor by the act of the party, it is then in gross, and not appendant (*o*): 7. So where the owner of a manor, to which an [9] advowson was appendant, accepts a fine of the advowson, with a grant and render back of every second turn; now, for such turn the advowson is in gross, but for other turns the appendancy still

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(*l*) *Het.* 14. *Hutt.* 88. S. C.

(*m*) 3 *Salk.* 25. 40. *Reynolds* v. *Blake.*

(1) But no such disappendancy is hereby made in churches of the King's presentment. *Gibs.* 757. 3 *Leon.* 17. *Hob.* 140.

(2) It would be otherwise if it were a *collation. Gibs.* 757.

(3) This rule is the same in equity, because it is the general rule that equity follows the law, whether originally a resolution of the common law, or introduced by statute. The stat. 13 *Ed.* 1. *West. Sec. c.* 5. *infra*, was intended to secure the peace of the church; and being considered as a statute of limitation, it is a bar of an equitable as well as of a legal right, and therefore a plea of plenarty of six months and upwards is allowed. *Boteler* v. *Allington*, E. 1746. 3 *Atkyns*, 455.

(*n*) 1 *Inst.* 333. *b. Hob.* 140. But the stat. 7 *An. c.* 18. provides, that no usurpation shall displace the estate of the patron. See *infra*, 16.

(*o*) *The King* v. *Bishop of Chester*, 3 *Salk.* 24. 1 *Raym.* 198. 292. 2 *Salk.* 560. S. C.

continues (4): but if a man levy a fine of the advowson, and accepts a grant and render, the appendancy is quite gone, because there was an instant of time, in which it became severed (p): 8. So where there are two coparceners of a manor to which an advowson is appendant, and they make partition of the manor, without taking notice of the advowson; at every other turn it is still appendant; but if there had been any express exception of the advowson, it would then be in gross. *Gibs.* 757. (5)

But in the case of the king, by the statute of *Prerogativa regis*, 17 Ed. 2. c. 15. When the king *giveth or granteth* a manor or land, *with the appurtenances; unless he make express mention* in his deed or writing of advowsons of churches when they fall, belonging to such manor or land, then at this day the king reserveth to himself such advowsons, albeit that among *other persons* it hath been observed otherwise.

Giveth or granteth] But when he *restoreth*, as in case of the restitution of a bishop's temporalities; then advowsons pass without express mention, or any words equivalent thereto. 10 *Co.* 64.

Without he make express mention] Either by name, or *with the appurtenances*, or *as fully and perfectly*, or *in as ample manner and form*, or the like; which have been adjudged equivalent to an express mention: because the grantee may enquire what the appurtenances were, and in what manner and form it was held; and forasmuch as the uncertainty may be reduced to a certainty by inquiry or circumstance, the grant is good. 10 *Co.* 64.

Other persons] The law, in the case of a common person, is thus set down by Rolle, out of the ancient books: If a man seised of a manor to which an advowson is appendant, aliens that manor, without saying *with the appurtenances* (and much more without *naming* the advowson), yet the advowson shall pass; for it is parcel of the manor. 2 *Rolle's Abr.* 60.

[Advowson of a moiety of a church.

[Advowson of a moiety of the church is when there be several partners, and two several incumbents in one church, the one of the one moiety, and the other of the other moiety; and one part

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(4) *Dyer*, 259. *b.* 1 *Rol.* 232. *l.* 25.
(p) 3 *Salk.* 24, 25. S. C.
(5) *Co. Lit.* 122. *a.* 1 *Rol.* 231. l. 42. 3 *Salk.* 25. But if parceners make partition of a manor, and accept the advowson, they have it in coparcenary in gross. *Co. Lit.* 122. *a.* *Ld. Raym.* 198. A covenant between joint tenants of an advowson in gross to present by turns amounts to a partition, and will enable each, individually in his turn, to maintain a *quare impedit*, even against a stranger. *Bp. of Salisbury* v. *Philips*, 1 *Ld. Raym.* 535. 1 *Salk. Rep.* 43. Again, if there are three joint tenants of a manor with an advowson appendant, one of whom releases the advowson to another, he has the third part in gross. 33 *H.* 6. 4. *b.*

as well of the church as of the township is allotted to the one, and the other part to the other: in which case each patron shall have a *quare impedit*, or writ of right of advowson for the moiety, and each incumbent a *juris utrum* for the other. (6) So one may have the nomination, and another the presentation to the same church (7); but the nomination is the substance of the advowson, and the presentor has only a ministerial interest (8); but if the right of nomination is in one, and of presentation in another, and either impede the other in his right, a *quare impedit* lies. (9) Again, as two parsons may be in one church, so two may make but one parson therein, and shall join in a *juris utrum*. (10) As to writ of right of advowson for a moiety of the *advowson*, see *infra*, this title, 8.]

4. The right of property which a patron hath in an advowson, will not warrant a plea (as it is in temporal property) that he is seised in his *demesne as of fee;* but only, seised *in fee*. The reason of which is, because that inheritance savouring not *de domo*, cannot either serve for the sustentation of him and his household, nor can any thing be received for the same, for defraying of charges. And in the case of *John London* and the church of *Southwell*, where the words of the lease were, "commodities, emoluments, profits, and advantages, to the prebend belonging;" it was adjudged that the advowson could not pass by the said words, because all of them implied things gainful; which (as was added) is contrary to the nature of an advowson, regularly. 1 *Inst.* 17. *b.* (*q*)

Advowson only a trust.

[10]

And hereby it appeareth, how the common law doth detest simony, and all corrupt bargains for presentations to any benefice; but that a fit person, for the discharge of the cure, should be presented freely without expectation of any thing. Nay, so cautious is the common law in this point, that the plaintiff in a *quare impedit* could recover no damages for the loss of his presentation, until the statute of the 13 *Ed.* 1. *c.* 5. And that is the reason that guardian in socage shall not present to an advowson, because he can take nothing for it, and by consequence he cannot account for it; and by the law he can meddle with nothing that he cannot account for. 1 *Inst.* 17. *b.*

Which said doctrine, and the plain tendency thereof, are exactly agreeable, not only to the nature of advowsons, which are merely a trust vested in the hands of patrons by consent of

(6) *Co. Lit.* 17. *b.* 18. *a.*, note the diversity, *id.*: and as to a rectory, *id.* 17. *b.* note (5).

(7) *Sherley* v. *Underhill*, *Moor*, 894. 2 *Rol.* 342. pl. 25. *Dal.* 48.

(8) *Moor*, 894. Qu. *Dal.* 48.

(9) *The King* v. *Stafford* (Marquis) *and Giffard*, 3 *Term Rep.* 646.

(10) *Co. Lit.* 18. *a.*

(*q*) *Hob.* 304.

the bishop, for the good of the church and religion; but also to the express letter of the canon law, the rule of which is, that the right of patronage, being annexed to the spiritualty, cannot be bought or sold. (*r*) So that the notion and practice of making merchandise of advowsons and next avoidances, is not easily reconciled, either to the laws of the church, or to the ancient laws of the land, or to the nature of advowsons, considered as trusts for the benefit of men's souls. Nor doth it follow, either from the patron's being now vested with that right by the common law, or from its being annexed to a temporal inheritance, that it is itself a temporal inheritance, or ought (legally speaking) to be considered otherwise than as a spiritual trust: since it is certain, that the foundation of the right was the
[11] consent of the bishop; and as to what is called appendancy, it amounteth to no more than this, that a trust of a spiritual nature, and for spiritual ends, shall rest in the same person to whom the temporal inheritance doth belong. For the separation of advowsons from the manors, and the grants of next avoidances and the like, were steps taken afterwards, and what undoubtedly were never thought of by the bishop upon the first concession; who had nothing in his eye but the encouragement of such pious foundations, and a reasonable respect to the founder (who was supposed to dwell there) in the nomination of such a clerk as might be acceptable to himself; under the restraint, of being admitted or not admitted by the bishop. *Gibs.* 758.

The equity of which union of the advowson to the manor, seems to be the foundation of that maxim of the canon law, *jus patronatus transit cum universitate nisi specialiter excipiatur* (*s*); and of the common law, that the advowson passeth with the manor of course, without any express words to convey it; for though it be otherwise in the case of the king, yet that is upon the foot of the statute of *Prerogativa regis*, [17 *Ed.* 2. *c.* 15.], and not of the common law. *Gibs.* 758.

To this purpose it is material, that the canon law expressly forbad the obtaining and procuring of next presentations; as we find in a decretal epistle of pope Alexander the third to the bishop of Exeter; upon which, the rule of the law is, that he who purchaseth an advowson ought to be deprived thereof. *Gibs.* 758. (*t*)

(*r*) *De jure vero patronatus mandamus quatenus si R. illud comparavit, (cum inconveniens sit vendi jus patronatus, quod est spirituali annexum,) contractum illum irritum esse decernas.* X. 3. 38. 16.

(*s*) *X.* 3. 38. 7. *in Gloss.*

(*t*) *Qui emit jus patronatus ut possit præsentare filium vel nepotem seu quem vult eo privari debet.* Ib. c. 6.

5. Advowson being an inheritance incorporeal (2), and not lying in manual occupation, cannot [if in gross] pass by livery [or verbal grant (3)]; but may be granted by deed, or by will, either for the inheritance, or for the right of one or more turns, or for as many as shall happen within a time limited. (4) But How grantable.

(2) *Co. Lit.* 17. *a.*
(3) *Co. Lit.* 332. *a.* 335. *b.* 2 *Wooddeson*, 64. 2 *Bla. Comm.*, by *Christian*, 22. note.
(4) *Hobart*, 322. *Co. Lit.* 249. *a.* A presentation of a benefice of 10*l.* value in the king's books ought now to be in writing. See Benefice, I. 19.

As to grants by deed of advowsons in gross.]—If there is a feoffment of an acre of a manor to which, &c. with the advowson, it will not be appendant to that acre unless it be by deed, (1 *Rol.* 231. *l.* 30. *Dub. Sav.* 104.,) or by express mention of the advowson, (1 *Rol.* 232. *l.* 5. 10.); but if there is a feoffment of a manor, and, before attornment, the feoffor grant the advowson by deed, the grant is void, for it passed by the livery, (1 *Leonard*, 208.,) if the livery was executed. 2 *Rol.* 91. Nor will advowson granted by bargain and sale pass if the deed be not inrolled. 1 *Rol.* 100. Advowson in gross, with one acre of land, may pass by common recovery on a writ of entry *sur disseisin* in the *post*. *Bailey* v. *University of Oxford*, 2 *Wils. Rep.* 116.

Words of grant of advowson by the king or a subject.]—In the case of a subject, advowsons appendant pass by grant of the manor, &c. to which, &c., (1 *Leon.* 208.,) without the words "with the appurtenances." *Co. Litt.* 307. *a.* So in case of the king till 17 *Ed.* 2. *c.* 15. *ante*, p. 9. *Stamf. Prerog.* 42. 10 *Rep.* 64. Thus, if the king demises the manor to which, &c., *with the appurtenances* for years, the advowson does not pass, *Hobart's Rep.* 127. Nor if he has a rectory appropriate, and grants the advowson of *B.*, neither rectory nor advowson pass, 3 *Leon.* 101. 2 *Rol.* 45. *l.* 15.; but since that act, and before 12 *Car.* 2. *c.* 24., if the king made livery to his ward, at full age, of his lands, the advowsons appendant passed to him without express mention. *Stamf. Prerog.* 42. 10 *Rep.* 64. *b.* And the like is now if the king grant the temporalties to a bishop, (*id. ibid.*); or render the lands of an idiot to his heir, (*Stamf. Prerog.* 43. *a.*); or if a manor, with an advowson appendant, come to the king by purchase or escheat, and he grant it *adeo plenè* as such a one had it, the advowson passes *Stamf. Prerog.* 44. *a.* 2 *Leo.* 26. 2 *Rol.* 185. *l.* 30. 10 *Co.* 65 *Dy.* 350. *b.* Again, by a grant by the king of "*all his tenements*," or "*all hereditaments*," in *D.*, the advowson of *D.* passes, though not particularly named. *Hobart*, 304. *Dy.* 323. *b.* 350. *b.* 2 *Rol.* 185. *l.* 30. Or by "*his lands and tenements*," (*Perk. Grant*, *s.* 116.); but these last words have not this meaning in a devise by a common person, to apply the rents to certain charitable uses. *Kensey* v. *Langham*, *Cas. temp. Talb.* 143.

Words of grant of advowson in general.]—Advowson will not pass by the word "*lands*," but it will by "*hereditaments*," (*Savil* v. *Savil*, *Fortescue*, 351. *Westfaling* v. *Westfaling*, 3 *Atk.* 460. 465. *Robinson* v. *Tonge*, 3 *P. Wms.* 401. 8 *Bro. P. C.* 556. 2 *Stra.* 879. *Kynaston* v. *Clarke*, 2 *Atk.* 206.); or by the word "*church*" (*Ashegell* v. *Dennis*,

this general rule with regard to advowsons in gross, next avoidances, and the like, is to be understood with two limitations:

(1.) That it extends not to ecclesiastical persons of any kind or degree, who are seised of advowsons in the right of their
[12] churches; nor to masters and fellows of colleges, nor to guardians of hospitals, who are seised in right of their houses: all these being restrained (the bishops by the 1 *El.* c. 19. and the rest by the 13 *El.* c. 10.) from making any grants but of things corporeal, of which a rent or annual profit may be reserved; and of that sort, advowsons and next avoidances, which are incorporeal and lie in grant, cannot be. And therefore such grants, however confirmed, are void against the successor; though they have been adjudged to be good against the grantors (as bishop, dean, master, or guardian) during their own times. (*u*)

(2.) Where the right of granting is absolute and indisputable; yet a grant cannot be made by a common person, whilst the church is void, so as to be entitled thereby to such void turn. (5) For however the avoidance that shall happen next after (6), or the inheritance of the advowson, may be granted when the church is void; the void turn itself (being a mere spiritual thing, and annexed to the person of the patron) is not grantable: it is then (as the law books speak) a thing in power and authority, a thing in action and effect; the *execution* of the advowson, and not the *advowson*. This is the doctrine and language of all the books; which also say, that if two have a grant of the next avoidance, and one releaseth all right and title to the other while the church is void; such release for the same reason is void (7), [or if the grantee assigns after avoid-

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1 *Leon.* 191. *Co. Lit.* 17. *b.*); or by the words "*dispositionem ecclesiæ.*" *Hobart*, 152. Advowson of vicarage does not pass by grant *de vicariâ suâ.* 1 *Leon.* 191. *Gostwich's* case, *Cro. El.* 163.

When advowson passes by grant of parcel of manor, &c. to which it is appendant.] — If the king, for a forfeiture, seize a manor, or two parts of it, the advowson passes, though not named in the inquisition. *Hobart*, 127. A rectory in two moieties, both appropriated to a religious house, may, after the dissolution, be granted as entire. *Stoughton* v. *Palmer*, *Jones*, 446. But by a grant of several parcels of a prebend to which, &c. with all commodities, emoluments, and appurtenances, the advowson appendant to the prebend does not pass (*Bishop of London* v. *Southwell*, *Hob.* 303, 304.); nor by a grant of so many acres, or a third part of the manor, without express mention of the advowson. 1 *Rol.* 232. *l.* 5. 10., and 231. *l.* 30. *Dub. Sav.* 104.]

(*u*) *Cro. Eliz.* 207. 690.

(5) *Moore*, 89. *Dy.* 129. *b.* 26. *a.* 282. *b.* 283. *a.*

(6) *Dy.* 26. *a.* *Stephens* v. *Clark*, *Moor*, 89. *acc.* *Cro. El.* 173. *cont.* *Dyer*, 283. *a.*

(7) *Brooksby's* case, 1 *Leo.* 167. *Cro. El.* 173. 600. *Owen*, 85.

ance, (8)]. But all this is to be understood of common persons only, and not of the king; whose grant of a void turn [by express words (9)] hath been adjudged to be good. *Gibs.* 758. *Wats.* c. 10. (10)

And with respect to *clergymen* in particular it is enacted by the 12 *A. st.* 2. c. 12. as follows: Whereas *some of the clergy have procured preferments for themselves by buying ecclesiastical livings,* and others have been thereby discouraged; it is enacted, That if any person shall for any sum of money, reward, gift, profit, or advantage, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance [13]
of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, in his own name, or in the name of any other person, take, procure, or accept *the next avoidance of or presentation to* any benefice with cure of souls, dignity, prebend, or living ecclesiastical, and shall be presented or collated thereupon; every such presentation or collation, and every admission, institution, investiture, and induction upon the same, shall be utterly void, frustrate, and of no effect in law, and such agreement shall be deemed a simoniacal contract; and it shall be lawful for the queen, her heirs and successors, to present or collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only; and the person so corruptly taking, procuring, or accepting any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have and enjoy the same, and shall also be subject to any punishment, pain, or penalty, limited, prescribed, or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made after such benefice, dignity, prebend, or living ecclesiastical, had become vacant; any law or statute to the contrary in any wise notwithstanding.

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(8) 2 *Rol.* 45. *l.* 37., 47. *l.* 12.

(9) *Hob.* 140. *Cro. Eliz.* 173. 3 *Bur.* 1512. where the true reason is said to be not because it is a *chose* in action, but from the danger of simony. See Benefice, I. 2. But [see *Moor*, 249.] in *Grey* and *Hesketh*, Lord *Hardwicke* was of opinion, that the sale of an advowson, during the vacancy, is not within the statute of simony, but is void at the common law; though, if more money had been given by reason of the vacancy, it might be within the statute. *Amb.* 268. See Simony, II. 1. and Benefice, I. 1.

(10) And 3 *Leon.* 196. *Dyer*, 283. *a.* Thus, if the king after avoidance grant the manor, with the advowson appendant, the grantee shall not have the presentation. *Sir Thomas Gorge* v. *Dalton*, 3 *Leon.* 196. *Dy.* 300. *a.* 2 *Rol.* 19. *l.* 15. 20.

Colleges in the English universities may hold advowsons without restriction in number, 45 *G.* 3. *c.* 101. *repealing* 9 *G.* 2. *c.* 36. *s.* 5. which limited the number to that of a moiety of their fellows.

But this act being only restrictive upon clergymen, all other persons continue to purchase next avoidances as they did before, and present thereunto as they think proper. (2)

How inherited from the ancestor.

6. As to advowsons in gross, there cannot be any descent thereof from the brother to the sister of the intire blood, but the same shall descend to the brother of the half blood, unless the first had presented to it in his lifetime, and then it shall descend to the sister, she being the next heir of the intire blood. *Wats. c.* 8. (*x*)

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(2) *Grants of next avoidances or presentations.*] — The grant of a next avoidance, or presentation, which is the same, (*Dyer*, 35. *b*.) may be made for the life of another; and determines, if no avoidance happens, or presentation is made in that life. 2 *Rol.* 49. *Mann* v. *Bishop of Bristol*, *Cro. Car.* 505. *Jones*, 407. S.C. So it may be made to *A.*, *B.*, and *C.*, or one of them, jointly and severally; and *A.* may release to *B.* before the avoidance, (*Bennet* v. *Bishop of Norwich*, *Cro. El.* 600. *Brookshie*'s case, *id.* 173. *Lewes* v. *Bennet*, *Moore*, 467.); or may present *B.* on the next avoidance. *Fuljambe*'s case, *Bendl. pl.* 40. *Moor*, 4. *Longforth*'s case, 1 *And.* 2. *Hollis*'s case, 4 *Leon.* 119. Such grant may be assigned *before* the avoidance happens, (2 *Rol.* 45. *l.* 35. 37. 47. *l.* 12.); but if granted *after* it happens, it seems that that grant only passes the next avoidance. *Dyer* 26. *a.* *Stephens* v. *Clark*, *Moore*, 89. *acc.* *Brookbie*'s case, *Cro. El.* 173. *cont.* *Dyer*, 283. *a.* A grant of a next avoidance to one without his privity is a resulting trust for the grantor, no other trust being declared. *Duke of Norfolk* v. *Browne*, *Prec. Ch.* 80.

Of two separate grants of a next avoidance to *A.* and *B.*, the second is void. *Co. Lit.* 378. *b.* *Williams* v. *Bishop of Lincoln and Corporation of Bedford*, *Cro. El.* 790. *acc.* *Dy.* 35. *a.* *in marg. semb.* *Williams* v. *Bishop of Lincoln*, 2 *And.* 174. If the second grant be by deed to the same person, it is a surrender of the first. *Dy.* 35. *a.* *in marg.* So is a grant of a next avoidance by a parcener, after her own presentation. *Semb. Dy.* 35. *a.*

If the grantee of a next avoidance be defeated of it, he shall not present on a subsequent avoidance: as if the presentation to the next avoidance be made by the king or bishop on a lapse, or by usurpation. Or if the king presents thereto by his prerogative, on the incumbent being made a bishop, (*Woodley* v. *Bishop of Exeter and others*, *Cro. Jac.* 691.); or grants it to the incumbent to hold in *commendam*, (*ibid.*); or if the next avoidance be evicted by a better title, as by statute, &c. (*ibid.*); or if the grant is of the third avoidance, which is used by the wife for her dower (*ibid. acc.* *Co. Lit.* 379. *a. cont.*): so if the grantee present by simony, though void by stat. *Eliz.* *Hobart*, 168. But if after grant of the three next avoidances *successivè*, the grantor himself presents, grantee may present on the subsequent avoidances. *Co. Lit.* 249. *a.* *Slade* v. *Drake*, *Jones*, 6. *cont. per Js. acc. per Hutton.* *Elvis*'s case, *Hob.* 322. Again, if *A.* usurp on the grantee of a next avoidance, who brings a *quare impedit*, and *pendente lite*, *A.*'s clerk resigns, grantee, after judgment for him, shall have the subsequent avoidance. 21 *H.* 7. 8. *a.*

(*x*) The latter case is governed by the maxim *Possessio fratris de feodo simplici facit sororem esse hæredem;* but in the former, the

So if one be seised of an advowson in fee, and the church doth become void, the void turn is a chattel; and if the patron dieth before he doth present, the avoidance doth not go to his heir, but to his executor. *Wats. c.* 9. (*y*)

But if the incumbent of a church be also seised in fee of the advowson of the same church, and die, his heir, and not his executors, shall present: for although the advowson doth not descend to the heir till after the death of the ancestor, and by his death the church is become void, so that the avoidance may be said in this case to be severed from the advowson before it descend to the heir, and vested in the executor; yet both the avoidance and descent to the heir happening at the same instant, the title of the heir shall be preferred as the more ancient and worthy. *Wats. c.* 9. (3) [14]

May be devised by will.

7. By last will and testament, the right of presenting to the next avoidance, or the inheritance of an advowson, may be devised to any person; and if such devise be made by the incumbent of the church, the inheritance of the advowson being in him, it is good though he die incumbent; for although the testament hath no effect but by the death of the testator, yet it hath an inception in his lifetime. (4) And so it is, though he appoint by his will who shall be presented by the executors, or that one executor shall present the other, or doth devise that his executors shall grant the advowson to such a man. *Wats. c.* 10.

But by a general devise of *lands*, an advowson in gross will not pass; but by the words *tenements and hereditaments* it will, for an advowson is an hereditament. 3 *Atkyns* 460. (5)

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brother, not having been actually seised, does not transmit the inheritance to the sister. *Co. Lit.* 15. *b.* 3 *Rep.* 41. *b.*

(*y*) *Co. Lit.* 388. *a.* 4 *Leon.* 109. *F. N. B.* 34. *a.* But this is to be understood of presentative benefices, for in a donative such void turn descends to the heirs. *Repington* v. *Tamworth School* (*Governors*), 2 *Wils.* 150. See Benefice, 5.

(3) When the title of a family to an advowson was evidenced by conveyances and deeds for nearly 140 years, and there had been three presentations by them and none by the crown, a grant will be presumed. *Gibson* v. *Clark*, 1 *Jac. & Walk. Rep.* 159.

(4) *Pynchyn* v. *Harris*, *Cro. Jac.* 371.

(5) *Co. Litt.* 6. *a.* 3 *Brod. & Bing. Rep.* 27. S.P. But where *A.* seised in fee devised '*lands and tenements*' in *B.* to trustees to apply part of the rents in augmentation of eight several vicarages; the *heir* shall present to the church of *B.* *Kensey* v. *Langham*, *Ca. temp. Talb.* 143.

These words of devise, "I do give to my son *R.*, the perpetual advowson of *H. B.*, in Leicestershire, and my manor of *S.*, and all my lands in Northamptonshire," were held to give only an estate for life in the advowson to *R.*, though he at the time of making the will was incumbent of the living: *Pocock* v. *Bishop of Lincoln*, 3 *Brod. & Bing. Rep.* 27. 1 *Price's Rep.* 353. S.C.: for an advowson is

Advowson in coparceners.

8. Where there are divers patrons, and they vary in their presentment; if they be joint-tenants, or tenants in common, of

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one of those things which must have words of inheritance, as " heirs for ever," added to them according to *Litt. sect.* 1. to confer an estate in fee simple; *Co. Litt.* 4. *a.*: and the word '*perpetual*' is descriptive only of the thing devised, and not of the *quantum* of the devisor's interest. S.C. *Park* J. *dissentiente; Semb.* on ground of intention raised in the will.

Devises of advowson for particular purposes, and herein of resulting trusts, &c.] By devise of '*lands, tenements, and hereditaments,*' subject to a term, in trust to receive the rents, issues and profits from time to time, and to dispose, &c. an advowson in gross passes, and a sale of the next presentation within the term, by direction and for benefit of *cestui que* trust, was established, *Earl of Albemarle* v. *Rogers*, 2 *Ves. jun.* 477. *H.* devised his manors, advowsons, &c. to trustees to pay his son 1,000*l.* per annum out of the rents and profits, and directed the rest to be laid out and settled; a living became vacant. Held, that the presentation went to the heir at law, as undisposed of, *Sherrard* v. *Lord Harborough*, *Ambl.* 165. Devise by rector of *B.*, of the perpetual advowson of *B.*, to *G. S.*, willing her to sell it to Eton College, and on refusal to another college, and on refusal to any other college in Oxford or Cambridge, being the best purchaser. This is not a resulting trust of the advowson to the heirs of the testator, but a devise of the beneficial interest therein to *G. S.*, with an injunction only to sell to particular societies, and on an avoidance by the death of the testator, the devisee and not the heir shall present. *Hill* v. *Bishop of London*, 1 *Atk.* 618. *W. H.* by will devised the perpetual advowson of *S.* to *W. C.* on trust to present his son to the living, and that if the church should next after his death be full of an incumbent, then to sell the perpetuity and apply the profit arising from the sale, first, to the payment of debts, and then to distribute the surplus in thirds to his daughters. The son was presented and died before the advowson was sold, leaving an infant daughter, who brought her bill insisting on a resulting trust in the advowson to her as heir at law, after debts and legacies paid: Held that the whole legal estate being devised away, there could be no resulting trust for the heir. So if *A.* seised of an advowson be also incumbent and devises it, the devisee after his death shall nominate; for where the ownership and property of an advowson are in the devisees, they and not the heir shall nominate in consequence of such ownership, nor will it make any difference whether the devisee has the advowson in him, as a personalty or realty. *Hawkins* v. *Chappel*, 1 *Atkyns* 622. Where trustees had an advowson with directions to present in a certain time; this was held to be only directory, and they may do it afterwards, but must join in the presentation. *Attorney General* v. *Scott*, 1 *Ves.* 415. *Wilson* v. *Dennison*, *Ambler* 82. Assignee of surviving trustee is entitled to nominate instead of the lord of the manor. *Attorney General* v. *Floyer*, 2 *Vern.* 748. Where by neglect the number of trustees to present to a living was not filled up at the time of an avoidance, the court would not by an injunction prevent the effect of a presentation, under the legal title of the heir of the surviving

the patronage, the ordinary is not bound to admit any of their clerks; and if the six months pass, then he may present by the lapse; but he may not present within the six months, for if he does, they may agree and bring a *quare impedit* against him, and remove his clerk, and so the ordinary shall be a disturber." *Dr. & St. b.* 2. *c.* 30. (*z*)

Joint-tenants, and tenants in common. [See BENEFICE, I. 4. as to presentations in turn, and when a turn is served. *Com. Dig. Eglise* (H. 3, 4.) (6)]

trustee without special ground, but will take care that the trust shall be properly filled in future. *Attorney General* v. *Bishop of Litchfield*, 5 *Ves.* 828., and will fix a meeting to fill up the places of the deceased trustees, or if they are all dead, new ones will be appointed. *Attorney General* v. *Scott*.

Where the trust of an advowson is to present some such fit person as the inhabitants and parishioners, or the majority of the chiefest of them should nominate, the right of election is in the inhabitants above the age of 21 years, paying the church and poor rates, and popular election by a majority of such voters and others not so qualified was in this case established. *Fearon* v. *Webb*, 14 *Ves.* 13., and *semb.* assessment gives a right to vote, though payment is not made. *Attorney General* v. *Foster*, 10 *Ves.* 335. *Same* v. *Newcombe*, 14 *Ves.* 1. and see *infra*, Vol. ii. 57. note (*q*).

(*z*) *Reynoldson* v. *Blake and Bishop of London*, 1 *Raym.* 197.

(6) Note, *Coparceners* are, where lands descend to daughters, sisters, or other females of kin in equal degrees; these are but as one heir to their ancestor; and they or their heirs respectively hold the lands together, till a partition is made, either by mutual consent, or by the writ *de partitione facienda*. *Joint-tenants* are, where lands are conveyed to two persons, or more, jointly; and these must jointly plead and sue, as coparceners must do; but joint-tenants have a sole and peculiar quality of survivorship, so as when one of them dies the survivor or survivors shall have the whole. *Tenants in common* are they, who have lands by several titles, and not by a joint title, and none of them knoweth his several part, but they occupy and take the profits in common.

Joint-tenants for advowson.] If an advowson is vested in trustees and their heirs on trust to present to the church, whenever it becomes vacant, they are joint-tenants, and therefore on any avoidance before severance, they must all join in the presentation, *Wilson* v. *Kirkshaw*, 1 *Ves.* 413. 7 *Bro. Parl. Cas.* 296., and see *Attorney Gen.* v. *Scott*, 1 *Ves.* 415. So if there are several *cestuique* trusts of a presentation, they must all agree, or there can be no nomination. *Seymour* v. *Bennet*, 2 *Atk. Rep.* 482. If there are two joint-tenants of an advowson, and one presents without the other, this is no usurpation on his companion, but if the joint-tenant who presented dies, it shall serve for a title in a *quare impedit* brought by the survivor: if one joint-tenant presents, or if they present severally, the ordinary may either admit or refuse such a presentee, unless they all join, and after six months he may present by lapse. 1 *Inst.* 186. *b.* 2 *id.* 365. Joint-tenants of an advowson may make partition to present by turns, which will divide the inheritance *aliquatenus*, and create separate rights. So that the one shall present in the one turn,

And by the canon law, where divers did present, being either coparceners, joint-tenants, or tenants in common, the bishop, if he pleased, might judge of the fitness of the clerks, and choose which of them he would. *Gibs.* 765. (*a*)

But by the common law, if the patrons have the patronage by descent, as coparceners (7), then is the ordinary bound to admit the clerk of the elder sister; for the eldest shall have the preference in the law, if she will (8), and then at the next avoidance, the next sister shall present, and so by turns one sister after another, till all the sisters or their heirs have presented (9),

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and the other in the other, which is a sufficient partition, for partition of the profits is partition of the thing, where the thing and the profits are the same. It cannot make two advowsons out of one, but it can create distinct rights to present in the several turns. *Bishop of Sarum* v. *Philips*, 1 *Lord Raym.* 535., and in this case each of the parties is said to have *advocationem medietatis ecclesiæ*. 1 *Inst.* 18. *a.*

Tenants in common of advowson.] When an advowson is held in common, and the *rota* of presentation is not expressly settled, the first and peaceable presentations are evidence of composition between the parties. *Grocers' Company* v. *Archbishop of Canterbury*, 2 *Bla. Rep.* 774.

A patron is said to be disturbed in presenting, either when the bishop hath admitted and instituted a clerk upon the presentment of another pretended patron, or when the bishop will not admit the patron's clerk presented to him; but if the ordinary hath merely filled the church by a wrongful *collation*, the patron is not thereby disturbed, but he must actually present, and the ordinary must refuse to admit his clerk before the patron can bring his action; for though the ordinary hath collated, yet the true patron may present to the same ordinary, and he may institute the clerk, &c., and then the two clerks, in trespass, ejectment, or assize, shall try who hath the better title. *Complete Incumb.* 238. *Plow.* 500.

(*a*) X. 3. 38. 3.

(7) An advowson is an entire inheritance, and yet in effect may be divided between coparceners, for they may divide it to present by turns. *Co. Litt.* 164. *b.* *Bishop of Salisbury* v. *Phillips*, *Carthew*, 505. 1 *Salk.* 43. But if two coparceners agree to present by turn, each of them, in truth, has but *a moiety* of the church; but, as there is but one church and one incumbent, either of them, if disturbed, [*viz.* in presenting, see note (6)] shall have *quare impedit*, *&c. præsentare idoneam personam ad ecclesiam*, (*Co. Litt.* 18. *a.*, and authorities cited in *Hargrave's* note (2) there), but could have a writ of right of advowson *de medietate advocationis* merely, for in truth she has but a right to a moiety: whereas if there were two patrons and two incumbents in one church, each patron shall have a writ of right of advowson *de advocatione medietatis* of the church. *Co. Litt.* 18. *a.*, and see *ante.*

(8) *Co. Litt.* 166. 8 *Rep.* 92.

(9) This privilege extends not only to the heirs, but to the assignees of each parcener, whether taking by conveyance or by act

and then the eldest sister shall begin again; and this is called a presenting by turn; and it holdeth alway between coparceners of an advowson, except they agree to present together, or that they agree by composition to present in some other manner; and if they do so, the agreement must stand. But if after the death of the common ancestor the church voideth, and the eldest sister presenteth together with another of the sisters, and the other sisters every one in their own name or together, in that case the ordinary is not bound to receive any of their clerks, but may suffer the church to lapse; for he shall not be bound to receive the clerk of the eldest sister but where she presenteth in her own name." 1 *Inst.* 186. 243. 2 *Inst.* 364.

And in this case, where the patrons vary in presentment, the church is not properly said to be litigious, so that the ordinary shall be bound at his peril to direct a writ to inquire of the right of patronage, for that writ lieth, where two present by several titles; but these patrons present all in one title, and therefore the ordinary may suffer it to pass, if he will, into the lapse. *Dr. & St. b.* 2. *c.* 20.

And the privilege of the elder sister to present first in turn, goes to her assignee: as in the case of *Buller* and the Bishop of *Exeter*, *Dec.* 12. 1749. The estate of an advowson descended to two daughters as parceners. The church became vacant twice in their time, and both joined in presentation. The elder marries, settles her own estate in the common way, and dies. The other daughter, before it became vacant again, marries and makes a settlement of her part. A vacancy happening, *Buller* the husband of the elder, intitled to her estate as tenant by courtesy, [16]
or under the settlement, claims as in her turn, and presents. But the bishop objects thereto, because the younger sister and her husband, claiming an equal right to presentation as tenants in common, did not join. So that there being a litigation, he was willing to admit the person appearing to have right in courts of law. By Mr. Baron *Clarke* in the absence of the master of the rolls: I have always thought, that the many alternate presentations in this kingdom, must have arisen from estates descending in parcenary, where advowsons are upon them. It is the

in law, as tenant by the curtesy, who shall have the same privilege by presenting in turn as his wife, if alive, would have had. *Co. Litt.* 166. *b.* 186. *b.* 2 *Inst.* 305., and see *per Clarke, B. Willes' Rep.* 663., and *infra, Buller* v. *Bishop of Exeter.* And if, when *A.* the elder, and *B.* the second parcener, do not agree to present, *C.*, a stranger, impleads *A.* only by *quare impedit* on a vacancy, and recover, it will bar a *quare impedit* by *B.* against *C.* for that, but not for the next turn; *Barker* v. *Bishop of London and others, Willes' Rep.* 659., and an allegation in a *quare impedit*, that coparceners "*did* not agree" to present is good, and synonymous with averring, that they "*could* not agree." *Thrale* v. *Bishop of London*, 1 *Hen. Bla.* 412.

only estate that I know of, which in course, and by operation of law only, falls on several persons making but one heir, without the intervention of conveyances by will or otherwise of the owner of the estate; which makes it, although in some instances partaking of a tenancy in common, different from that and from a joint-tenancy, which are made by conveyance, and descendible in a different manner. An advowson is a particular sort of an estate so descendible. And as it is impossible to be divided into parts so as to be enjoyed separately, it is natural to follow the course that has been practised, that each parcener should have a turn to present, and to prevent confusion begin with the eldest. And in all the cases where disputes have arisen, whether the alienee of the elder sister should have the same privilege, or whether it should go to the next sister, it hath been determined in favour of the alienee. 1 *Vesey*, 340. (1)

By 13 *Ed.* 1. *West.* 2. *c.* 5. *s.* 5. When an advowson descendeth unto parceners, though one present twice, and usurpeth upon his co-heir; yet he that was negligent shall not be clearly barred, but another time shall have his turn to present when it falleth.

[17] The clerk of a coparcener, being once complete incumbent, though he is afterwards deprived, the turn is served; and so it is where by reason of some incapacity the institution was voidable by sentence declaratory, but not void (as hath been held, in case a layman is presented); because the church is full, until such sentence comes. But if after presentation, institution, and induction, the church remains not only voidable, but by special declaration of the law merely and actually void (as for not reading the articles, or the like); there the turn is not served, but the presentor may present again, because the church was never full. 5 *Co.* 102. *Gibs.* 765.

If a person presented by a coparcener, is incumbent, and deprived, and the next presents; notwithstanding that the second is complete incumbent, yet if he is deprived, and the first restored, the turn is not served; because the restoring of the first is a recontinuing of his incumbency upon the foot of the former presentation, institution, and induction; who also dying incumbent, will be the last presentee. 5 *Co.* 102. *Gibs.* 765.

By Statute 7 *An.* *c.* 18. If coparceners, or joint tenants, or tenants in common, be seised of any estate of inheritance in the advowson of any church or vicarage, or other ecclesiastical promotion, and a partition shall be made between them to present by turns; thereupon every one shall be taken and adjudged to be

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(1) And see *Harris's* Case, *Cro. El.* 19. 2 *Inst.* 365. See *Seymour* v. *Bennett*, 2 *Atk.* 482., as to parceners casting lots for first presentation, when they cannot agree.

seised of his or her separate part of the advowson, to present in his or her turn; as if there be two, and they make such partition, each shall be said to be seised, the one of the one moiety to present in the first turn, the other of the other moiety to present in the second turn; in like manner, if there be three, four, or more, every one shall be said to be seised of his or her part, and to present in his or her turn.

By Statute 13 *Ed.* 1. *West. Sec. c.* 5. Sometimes when an agreement is made between many claiming one advowson, and inrolled before the justices in the roll, or by fine, in this form, that one shall present the first time, and at the next avoidance another, and the third time another, and so of many in case there be many; and when one *hath presented*, and had his presentation, which he ought to have according to the form of their agreement and fine, and at the next avoidance he to whom the second presentation belongeth is disturbed by any that was party to the said fine, or by some other in his stead; it is provided, that from henceforth they that be so disturbed shall have no need to sue a *quare impedit*, but shall resort to the roll or fine; and if the said concord or agreement be found in the roll or fine, then the sheriff shall be commanded, that he give knowledge unto the disturber, that he be ready at some short day, containing the space of fifteen days or three weeks (as the place happeneth to be near or far), for to shew if he can allege any thing, wherefore the party that is disturbed ought not to present: and if he come not, or peradventure doth come and can allege nothing to bar the party of his presentation by reason of any deed made or written since the fine was made or inrolled, he shall recover his presentation with his damages. [18]

And this extendeth, as well to strangers of blood, as to coparceners that are privy in blood; and if one of the parties or his heirs, or any stranger usurp in the turn of another, the party wronged is not driven to his *quare impedit*; for it may be, that the *quare impedit*, or assise of *darrein presentment*, may fail; and yet he may have remedy by this act; for albeit there be a plenarty by six months, yet the party may have a *scire facias* upon the roll or fine, and therein recover the presentation and damages. 2 *Inst.* 361.

In the case of the bishop of *Salisbury* and *Phillips*, *M.* 11 *W.*, where two were seised in fee of the advowson in gross as joint-tenants, and, by indenture agreed from thenceforth to be seised thereof as tenants in common, and not as joint-tenants, so as they and their respective heirs should present severally and by turns; *Holt*, Chief Justice, said, that a composition might be, either by record, or by deed, or by parol: that after the first way, if one present, the other was not by an usurpation put to a *quare impedit*; that by the second way the composition is

good, and if it be once executed on all sides, he that brings a *quare impedit* need not mention the composition, which shews the very right and inheritance to be severed, and that a separate interest is vested in each, to present alternately; that the third way, may be between parceners, but between strangers in blood composition cannot be without deed. *Gibs.* 764. [1 *Ld. Raym.* 535.] 1 *Salk.* 43. *Carth.* 505.

Advowson in the mortgagor. [See Benefice, I. 8.]

9 *M.* 1700. *Amherst* and *Dawling*. The defendant having mortgaged the manor of Thundersley, to which an advowson was appendant, to the plaintiff, who brought the bill to foreclose, the church became void; the defendant moved the court for an injunction to stay the proceedings in a *quare impedit* brought by the plaintiff. By the court: Although the defendant Dawling hath no bill, yet being ready and offering to pay the principal, interest, and costs; if the plaintiff will not accept his money, interest shall cease, and an injunction shall be to stay proceedings in the *quare impedit*; for the mortgagee can make
[19] no profit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt; and the mortgagee therefore in that case, until a foreclosure, is but in the nature of a trustee for the mortgagor. — And the like order was made between *Jory* and *Cox* (2), where the defendant had an injunction against the plaintiff, to stay his presenting to a church that became vacant pending the suit. 2 *Vern.* 401.

So in the case of *Gully* and *Selby*, *M.* 7 *G.* It is a rule in equity, that though in the case of a mortgage in fee, the legal right of presentation is vested in the mortgagee: yet they will interrupt that presentation, and compel the ordinary to institute the clerk of the mortgagor any time before foreclosure; it not being any part of the profits of the estate. *Str.* 403. (*b*)

H. 1726. *Gardiner* and *Griffith*. S. G., plaintiff's father, being possessed of a long term for 99 years of the advowson of E., made a mortgage thereof to the defendant by way of assignment of the term, upon condition to be void on payment of the mortgage money and interest at the end of the year, and there was a covenant in the mortgage-deed, that on every avoidance of the church the mortgagee should present. Several years after the mortgagor died. It was admitted by the lord chancellor, and by the counsel on both sides, that if there be a mortgage made of a manor, and an advowson appendant,

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(2) *Pre. Ch.* 71.

(*b*) *Com. Rep.* 343. 609. *Str.* 403. S.C., [for instead of foreclosing, he should have prayed a sale of the advowson. *Mackenzie* v. *Robertson*, *T.* 1747. 3 *Atk.* 559. See *Amherst* v. *Dawling*, *supra*. *Attorney General* v. *Scarisbrick*, *id.* 550. *Jory* v. *Cox*, *supra*, and see *Robinson* v. *Jago*, *Bunb.* 130. *Dymoke* v. *Hobart*, 1 *Bro. P. C.* 81. *Forr. R.* 145.

before the mortgage is foreclosed, (though the mortgagee be in possession,) yet the mortgagor shall present if the church becomes void; for the presentation is to be presumed to yield no profit, and consequently cannot be accounted for. But the case here was said to differ; nothing being mortgaged here but the advowson: So that the mortgagee could have no other satisfaction, than by providing for a child, relation, or friend, on the church's becoming void; and the rather for that it was the express agreement in the mortgage-deed, that as often as the church should become void, the mortgagee should present: which express agreement would be good even in case of a mortgage of a manor with an advowson appendant; and this was still stronger, as it was in the case of a perishing term, where every presentee or incumbent would have an estate for life in the church: to which the court, though they gave no opinion, yet seemed to incline. (3) But it appearing, that this bill against the mortgagee and his presentee was brought seven months after institution, the lord chancellor dismissed the bill; declaring, that as a *quare impedit* was confined to the six months after the death of the last incumbent, so the bill seeking to compel the defendant to resign, and consequently to deprive him of his living, ought by the same reason to be limited to the same time; and the relieving against this would be to relieve against an act of parliament, which had punctually been observed for some hundreds of years, ever since the 13 *Ed.* 1. and that the six months time ought to be as much observed here as at law, in regard it tendeth to the peace of the church: indeed, had a *quare impedit* been brought within the six months, and the bill been preferred after the six months, the court might, on a proper case, give directions in aid of the *quare impedit,* that the mortgage should not be given in evidence; but here there was no *quare impedit* brought, and the bill came out of time. Wherefore by the court: Dismiss the bill as to that part which seeks to compel the defendant to resign his living; but let the plaintiff redeem the mortgage, on payment of principal, interest, and costs. 2 *P. Will.* 404. (*c*) [20]

[The mortgagee of a manor and advowson was in possession when the mortgagor made a simoniacal presentation of *A.*, who

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(3) But, on this case being cited in *Mackenzie* v. *Robinson*, 3 *Atk. R.* 559, 560, *supra*, Lord *Hardwicke* said it was a mixed case, and doubted whether the covenant that the mortgagee should present, as was the case there, was not void, being a stipulation for something more than the principal and interest, and the mortgagee cannot account for the presentation. See 2 *Fonbl. Tr. Eq.* 357.

(*c*) This decree was affirmed on appeal to the House of Lords. See 3 *Atk.* 559.; and see *Botelcr* v. *Allington, ante*, page 8. *note.*

was rejected by the bishop. Mortgagor and mortgagee then joined in presenting *B.*; *C.* got the title of the crown, and brought an information to remove the mortgagee's title that it might not be set up at law, which the court decreed. *Atto. Gen.* v. *Hesketh* *or Sudell, Ea.* 1706. 2 *Vernon* 549. *Prec. Ch.* 214.]

[21] 10. If a woman that hath an advowson, or part of an advowson, to her and her heirs, doth take an husband; the husband may not only present jointly with his wife during the coverture; but also having issue by her, after her death (though the right of patronage, so far as it was in the wife, descends to her heir; and though the wife did never present to it, but died before the church voided) the right of presenting during the husband's life is lodged in him, as tenant by curtesy, though his wife had but a seisin in law, because he could by no industry attain to any other seisin. (*d*) And if the church, in this case of the husband, void during his life, and then he die before the church is filled; yet the heir shall not have the turn, but the husband's executor. And if the church being void, the wife dies, having had no issue, so that the husband is not tenant by curtesy, yet he shall present to the void turn. *Wats. c.* 9. (*e*)

Advowson in tenant by curtesy. [See Benefice, I. 6.]

11. If a man that is seised of an advowson takes a wife, and dies; the heir shall have two presentments, and the wife the third; yea, and though the husband in his lifetime had granted away the third turn (*g*): that is, the wife may in a proper action recover the third presentation as her dower, or it may be assigned to her for dower: but without such recovery or assignment, the wife cannot make title to the advowson, or to any presentation, no more than she can enter by her own authority into any other lands or tenements to which she hath right of dower. Or if a manor, to which an advowson is appendant, doth descend to an heir, and he assigns dower to his mother of the third part of the
[22] manor with the appurtenances; she is thereby endowed of the third part of the advowson, and may have the third presentment. *Wats. c.* 9. (*h*)

Advowson in tenant in dower. [See Benefice, I. 7.]

[11. *a.* It was formerly understood that when a manor to which an advowson is appendant, was extended on a statute merchant, if the church became void during the cognizee's estate, he might present to it. *Arundell* v. *Bp. of Gloucester. Owen,* 49. But it is to be presumed, that if a case of this kind was now to arise, the cognisor of the statute would be allowed to nominate a clerk to the cognizee by analogy to the case of a mortgage. *Cruise's Digest, tit.* xxi. *cap.* ii. *s.* 40.]

Advowson in tenants by statute merchant.

[11. *b.* It has been held that if a patron of a church is a bankrupt, and the church becomes void before the advowson is sold

Advowson in Bankrupts.

(*d*) *Co. Lit.* 29. *a.* 166. *b.* [*Harris* v. *Nichols, Cro. El.* 19.]
(*e*) 21 *H.* 6. 56. *b.* *Br. Ab. pres. ul. Eg.* 22.
(*g*) *Co. Lit.* 379. *a.* *Dy.* 35. *b.*
(*h*) *Co. Lit.* 34. *b.* 37.

under the commission, the bankrupt shall present or nominate to the church. *Wats.* 106.]

12. *M.* 4 *G.* 2. *Robinson* and *Tonge.* In the chancery: Upon debate it was held, that an advowson in fee was real assets in the hands of the heir for payment of debts. And the decree was affirmed in the house of lords. *Str.* 879. *Viner*, Assets, A. 28. (*i*)

Advowson assets for payment of debts.

13. If two patrons present to one and the same church by several titles, the church is become litigious; because the bishop knows not which clerk to admit: and it seemeth, that the church is not less litigious, though they both present the same person (*k*); because when the bishop admits him as the clerk of the one, he puts the other out of possession, and consequently to his action; and the bishop becomes a disturber, if he who is put out of possession prove to have the better title. *Deg. p.* I. *c.* 3. (5)

Trial of the right of advowson in the spiritual court, by *jus patronatus.* (4)

But if two joint-tenants or tenants in common present several clerks, this doth not make the church litigious; for the bishop may admit the clerk of which he pleases: or if they do not agree and join in presenting a clerk within the six months, the bishop may collate. *Id.* (*l*)

Also where one patron doth present his clerk before any other hath presented, the church is not yet litigious; therefore if the bishop doth refuse him, he is a disturber: and though another should after present, whereby the church then doth become litigious, yet that will not excuse the bishop from being a disturber if the first patron be upon trial found to have the better title; nor can he have the benefit of lapse, though no action be brought against him, which makes it safe for the bishop to receive him that comes first. But then a question may be made, How can a church (the bishop acting thus safely for himself) ever become litigious? and how can it be truly said, that the bishop may justly refuse both clerks upon account of two several patrons making their several presentments to him, unless the presentees should happen to tender their presentments at one and the same time, which is not to be supposed? In answer to which, — It is true that if the bishop doth unjustly refuse the clerk of the true patron before any other presentment is made, although the church by another person's presenting after doth become litigious, he

(*i*) 3 *P. Wms.* 401. 3. *Brown P. C.* 556.

(4) See *Com. Dig. tit. Eglise* (K. 1, 2, 3.)

(*k*) But, in *Atto. Gen.* v. *Hesketh* or *Sudell*, *Ch. Prec.* 214. mortgagee and mortgagor joined in presentation; and no objection was taken on that account. Serjt. *Hill's* MSS.

(5) 2 *Leo.* 168. 1 *Roll.* 227.

(*l*) *Co. Lit.* 186. *b.* [But if the bishop suspect the title of the patron, he may award a *jure patronatûs*, though the church is not litigious. *Hobart. R.* 318.]

will not be excused (the true patron prevailing at last) from
[23] being a disturber; but there is a great difference betwixt the bishop's suspending the admission and institution of a clerk, and his absolute refusal of him. A bishop is not bound instantly upon the presentment tendered to admit, if he hath other business in hand; but may appoint the clerk to repair to him at another time to receive admission and institution. And when a person is presented to him, he may take competent time to examine his sufficiency, and inquire and inform himself of his conversation. (*n*) And by a hasty admission of the clerk of a disturber, the bishop might do great wrong in surprising other patrons that have right; and the law doth not so hasten the bishop's proceeding, but that he may take convenient time to examine the clerk, that other pretenders may take notice of the vacancy. *Watt. c.* 20. *Deg. p.* 1. *c.* 3. (*m*)

But in case the patron feareth that the bishop will admit another clerk, or be not yet resolved of his clerk, he may enter a caveat with the bishop not to admit the clerk of any other; and though this do not so bind up the bishop that he cannot admit the clerk of another person, yet if the bishop will presume to do it without a *jus patronatus*, he may bring himself under several inconveniences. *Deg. p.* 1. *c.* 3.

But a caveat entered during the life of the incumbent, is of no force. This was resolved in the case of *Hutchins* and *Glover*, *H.* 15 *Ja.* where the caveat was entered when the incumbent lay *in extremis*; and it had been declared in the spiritual court, that the institution afterwards given was void; for so is the rule of the canon and civil law, that a caveat may be entered where a person feareth a future damage: but in this particular it is of no force, because contradicted by the common law. However, where such suspicion is, that a title may probably be usurped upon an avoidance, it is a safe and advisable course to enter a caveat before the incumbent dies; which will be a restraint upon
[24] the ordinary from admitting any clerk hastily, though not in law, yet in equity and prudence. *Cro. Ja.* 463. *Gibs.* 778.

But nevertheless an admission contrary to the caveat entered, is good in law; that is to say, the admission, institution, and induction thereupon shall stand to all intents and purposes by the rules of the common law; in the eye of which the caveat is

(*m*) Twenty-eight days by the 95th canon, in 1603. Serjt. *Hill's* MSS.

(*n*) See *Hob.* 317., where excellent rules are given "to shew how the common law hath provided for the safety of the ordinary against disturbance, if he will not exceed his office, nor maintain parts, but carry himself indifferently amongst them that pretend to the patronage of the church as he ought to do, being in a sort a judge amongst them." See also *Lindw.* 138 *b.*, and Sir *W. Jones*, 4.

said to be only a caution for the information of the court (like a caveat entered in chancery against the passing of a patent, or in the common pleas against the levying of a fine); but that it doth not preserve the right untouched, so as to null all subsequent proceedings; nor hath it ever been determined, that a bishop became a disturber by giving institution without regard to a caveat; on the contrary, it was said by *Coke* and *Doderidge*, that they have nothing to do with a caveat in the common law. *Gibs.* 778.

Now the church being become litigious, the bishop in such case, in order to secure himself, ought to award a *jus patronatus* to inquire of the right; which is merely an inquest of office, in nature of a writ *de proprietate probanda*. *Deg. p.* 1. *c.* 3. (o)

And this process is part of the ancient inquisition, that we read of in our elder constitutions and records; which includes, not only an inquiry into the points immediately relating to the right of patronage, but also into the qualifications of the persons presented, and such other heads as the bishop thought it proper for him to be informed of. And this inquisition (however now grown to be occasional only, when churches happen to be litigious) seems anciently to have been issued of course, upon every presentation made, and antecedent to the admission and institution thereupon. *Gibs.* 778.

It hath been a question, whether the bishop is bound to sue the *jus patronatus* at his own cost and peril, or only at the prayer, and at the cost of the party that prays it, or of both parties: but the better opinion seems to be, and so is the practice, that the same is to be sued at the prayer and at the cost of one of the parties that prays it, or of both the parties if they join. *Deg. p.* 1. *c.* 3. *Wats. c.* 21. (34 *H.* 6. 12 *a.* and 33 *b.*) 2 *Leo.* 168.

And if the bishop refuseth to award it accordingly, though he may not be sued in the spiritual court, yet he thereby brings upon himself divers inconveniences: he becomes a disturber; and he hinders the lapse, if the clerk is not admitted in six months; and (as *Hobart* held) if such patron makes good his [25] title by due form of law, and did not name the bishop in the *quare impedit*, he may have an action upon the case against the bishop, and recover the costs and damages he hath sustained by reason of a wrongful admission of the bishop without the awarding of a *jus patronatus* as aforesaid. (p) But if the bishop happens to admit him who upon trial appears to have the

(o) *Hob.* 242. [And does not bind the patron; or the bishop, for he may admit the clerk of the other patron contrary to the verdict in a *jure patronatus* if he will. *Ibid.*]

(p) *Hob.* 318.

better title, then the other is without all remedy against the bishop. Gibs. 778. *Deg. p.* 1. *c.* 3. *Wats. c.* 12. (*q*)

Also either of the contending parties may demand a *jus patronatus* singly. *Gibs.* 778.

But in case the bishop delay to admit the true patron's clerk, he may sue a *duplex querela* out of the arches, to command the bishop to admit his clerk; and then, if the bishop do not admit the clerk within nine days, or the space assigned by the *duplex querela*, or return a legal cause why he doth it not, the metropolitan may admit the clerk in the ordinary's default. *Deg. p.* 1. *c.* 3.

But the bishop may return, if the truth be so, that the church is litigious, and that he cannot admit the clerk till the right be determined in a *jus patronatus*; which will excuse him. *Id.*

But the surest and safest way in this case is, if the bishop delay the true patron, immediately to sue a *quare impedit*, and thereupon a *ne admittas* to the bishop; and then if the bishop after the receipt of such writ, admit the clerk of any other person, without a verdict in a *jus patronatus*, the true patron may have a writ called a *quare incumbravit*, against the bishop, and may therein recover the presentation with damages. *Id.* (*r*)

The *jus patronatus* being awarded, is to be executed according to the form of proceeding in the ecclesiastical courts,

Which is thus:

The bishop, if he pleaseth, may sit himself as judge; but the usual way is by commission issued to his chancellor, or to such
[26] other person or persons as he shall judge proper, skilled in the canon and ecclesiastical laws. *Deg. p.* 1. *c.* 3.

These commissioners the bishop doth appoint to sit in the void church on a certain day; and doth decree a monition against the patrons presenting and the clerk presented, to be present there at the day appointed, to see the proceedings. *Clarke*, tit. 98.

Also the bishop is to decree, and send forth a public edict, against all having or pretending to have any interest or right of presenting to the vacant church, to appear at the day and place appointed, to shew their right. And this public edict is to be affixed to the door of the void church, in time of divine service. *Id.*

And at the day appointed for this inquiry, the person or persons executing the aforesaid mandates or citations, are to make

(*q*) For it is necessary to shew a title in the plaintiff in order to prove a tort in the bishop. But this is at the peril of the bishop. 34 *H.* 6. 11. *b.*

(*r*) *Fitz. N.B.* 37. 48. The *ne admittas* must be sued within six months after the avoidance; for afterwards the bishop may present for lapse.

oath of the due execution thereof; or the execution of them may be certified under some authentic seal, as of the archdeacon, or commissary. *Clarke*, tit. 100.

Against which day the bishop is also to summon a jury for this purpose by way of citation; which jury is to consist of six clerks and six laymen, that live near to the void church; or of as many more as the bishop pleases, the proportion being observed of clergy and laity, that there be as many of the one sort as of the other. *Clarke*, tit. 98. *Wats. c.* 21.

When the commissioners are set, they are to give directions to open the court; and the commission is presented, and read.

After which, the parties cited, and those of the jury are to be publicly called; and if any of the jury appear not, being duly summoned, they may be punished, that is to say, the clergymen by sequestration, and the laymen by excommunication, and so be compelled to appear. *Clarke*, tit. 100. *Wats. c.* 21.

But if twelve of the jury appear, that is, six of each sort, it is sufficient. *Clarke*, tit. 100.

And if others cited appear not, they are to be pronounced contumacious; and the proceedings are to go on notwithstanding, and *in pœnam contumaciæ* of them that do not appear. *Id.*

If six clergy and six laymen appear to be of the jury, which is the competent number, they are to be sworn faithfully to inquire of the articles; and in swearing them, first a clerk, then a layman is to be sworn, till a jury of twelve or more is made up. [27]
Clarke, tit. 100. *Wats. c.* 21.

Which articles are to contain the particulars about which the jury are to inquire; namely, 1. Whether the church be void, and how it became void. 2. Who presented at the last preceding avoidance, and at the two foregoing avoidances. 3. Whether the persons presenting presented in their own right. 4. In whom the inheritance of the advowson is, and who ought to present to the void turn. 5. Whether any of the clerks presented be known or suspected to be guilty of any crime, rendering him incapable of admission to the said benefice, as heresy, simony, perjury, adultery, drunkenness, or such like. *Clarke*, tit. 99. *Wats. c.* 21.

Then the counsel and advocates of both parties are to shew their respective clients' titles, and to produce their evidences, and prove the same. *Clarke*, tit. 100.

And after the evidence is given on both sides, and counsel fully heard, the jury may give their verdict at any time of the same day; or if the cause be doubtful, the judge may assign them a longer time for to consider of the matter, and assign also a place where they shall give their verdict. *Clarke*, tit. 100.

And according to the verdict given, the bishop admits and institutes the person in whom the right is found. Not that he is

absolutely bound to do this, or that the admission and institution of another is void in law; but this, generally speaking, is the fairest and most impartial way; and the bishop by doing otherwise, brings upon himself the inconveniences which accrue upon the refusal to award a *jus patronatus*. *Deg. p.* 1. *c.* 3. *Wats. c.* 21.

But suppose the jury will not agree of their verdict, and the one half be for the one patron, and the other half for the other patron; or that they refuse to give any verdict at all; or if they find a special verdict, as it seemeth that they may; or if (where two patrons have each a *jus patronatus*) there is a verdict in favour of each patron; it seemeth in these cases, that the bishop (inasmuch as he hath done his duty) may refuse both, without subjecting himself to any of the said inconveniences: though it is affirmed by some, that in such cases he may award a second *jus patronatus*. *Gibs.* 779. *Wats. c.* 21. *Deg. p.* 1. *c.* 3.

And it is to be observed, that after a verdict found in a *jus patronatus* for the patron, the patron must again request the
[28] bishop to admit his clerk; otherwise, if the church lapse after six months, the bishop may collate. *Deg. p.* 1. *c.* 3. (*s*)

It is to be observed further, that a church may again become litigious, if after verdict given upon a *jus patronatus*, another clerk is presented by a patron whose right was not discussed in the *jus patronatus*, before admission is requested of any clerk by him for whom the verdict was found. In this case a new *jus patronatus* upon request is to be awarded. But if one hath presented, and his title is found upon a *jus patronatus*, and then requests the bishop to have his clerk admitted, and afterwards another presents, in this case the bishop should for his safety admit the clerk of him for whom the verdict is found, because otherwise the church becomes litigious by his delay, which will make him a disturber; and if he doth not admit, but suffers lapse to come to himself, and then collates, it is said he is a disturber against both presenters. And in this case, in an action brought against the bishop, and the special matter being made appear by the pleading, the issue shall be, whether he for whom the title was found, did sue to have his clerk admitted, and whether the second presented so hastily to the bishop, that he could not admit the clerk of the first before the second presentation was made. *Wats. c.* 20. *Deg. p,* 1. *c.* 3. (*t*)

But after all, the effect of this suit is no more but for the bishop's security, that he may avoid being a disturber; for the verdict of this jury is a sufficient warrant for the bishop to admit

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(*s*) 34 *H.* 6. 12. *a.* But the Year-Book says, that the clerk, and not the patron, is to make the request.

(*t*) 21 *H.* 6. 44.

and institute his clerk, for whose title the verdict is given; and the bishop for so doing shall never be made a disturber, though the other patron against whom the verdict is given shall after recover in a *quare impedit* or other action: but this doth not at all bind the title or right of the party; for that must be done by some of the methods hereafter following. *Deg.* p. 1. *c.* 3. (*u*)

Concerning others than bishops who have power to grant institution, it is ordained by a constitution of archbishop Peckham, *that no dean*, or other prelate, (except the bishops, whose authority is not intended to be restrained by this constitution,) *shall make inquisition* concerning the matter of presentation of any person [29] to an ecclesiastical benefice, but in a full chapter *of the place*, having first cited him who hath possession of the church in such reasonable time, as he may have opportunity to advise with learned counsel and provide for his defence. And whatsoever shall be done contrary to this ordinance, shall be void; and the dean or prelate that made the clandestine inquest shall make satisfaction for the damages which such possessor hath suffered; and the ambitious aggressor shall be excluded from such benefice for ever, and from accepting any other benefice for three years. *Lind.* 217.

That no dean] That is, dean of any cathedral or collegiate church, or other dean to whom by prescription, or privilege, or otherwise, it appertaineth to grant institution. *Lind.* 217.

Shall make inquisition] By which, inquiry is to be made of the right of presentation, and the qualifications of the person presented, and also of the avoidance of the church, and the manner of the avoidance, and other articles usually inquired of in such cases. For he who instituteth, before his admission of the person presented, ought carefully to inform himself of all these things. *Lind.* 217.

Of the place] This may be understood of the church itself, to which the presentation is made. *Lind.* 217.

Trial in the temporal courts; by writ of right of advowson, *darrein presentment*, and *quare impedit*: under which are included also the writs of *indicavit*, *ne admittas*, *quare incumbravit*, and *quare non admisit*.

14. Albeit by the canon law the right of advowson is to be tried in the ecclesiastical court, yet the common law will not suffer this (5), and the reason is, because advowsons were generally appendant to manors or to the demesnes, and passed along

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(*u*) But per *Littleton*, this inquiry is strong evidence for the party in a *quare impedit*, as well as advantageous to put him in possession, 34 *H.* 6. 38. *b.*

(5) All writs of advowson of a church, *viz.* right of advowson, *quare impedit*, and assize of *darrein presentment* by a common person shall be in *C. P.* *Reg.* 29, 30., but *quare impedit* by the king may be in *K. B.* or *C. B.* *F. N. B.* 32. *E.*

with them, unless a particular exception was made. *Lind.* 217. *Ken. Impr.* 99. (*x*)

(*x*) The patron's right to an advowson may be tried in the temporal courts, by an action to recover the *inheritance*, as a writ of right of advowson or assize of *darrein presentment*, or by an action to recover the *possession*, as a *quare impedit*, which, as hereafter will appear, may be brought either by the patron or clerk against the bishop, clerk, or patron, who oppose their right. But if a man fail in a possessory action, he may still have a writ of a higher nature to try the right to the freehold and inheritance. 6 *Rep. Ferrer's case.* The learning of assizes is to be found in Lord *Coke's* Commentary on the statute of *West.* 2. *c.* 5., and in our author in this title; but these writs are now seldom used, and the right is generally tried by a *quare impedit;* especially since the stat. 7 *Ann. c.* 18. *infra, p.* 43., which prevents an usurpation from displacing the right of the patron. *Bull. N. P.* 121, 122. 3 *Bl. Com.* 245.

The parson may also defend his freehold in several ways. *Finch Law,* 131. He cannot have a writ of right, because he has not a fee simple. *Lit. sec.* 645. *See also note to tit.* Abeyance. But he may have an *assize de utrum,* if it be doubtful whether lands be lay-fee, or free alms belonging to the church, which is said to be *his* writ of right. 6 *Rep.* 8. Also an ejectment, stiling his church a messuage or house, and serving his declaration on the officiating parson. 11 *Rep.* 25. 1 *Salk.* 256. Also after induction, trespass against another clerk who meddles with the glebe and tithes. *Plow.* 500. *b.* If *B.* is tenant in common with *A.* of a wood, and *A.* commits waste, he may have a prohibition, as he himself may be prohibited by the patron from wasting the inheritance of the church. 11 *Rep.* 49. Church, V. 2, 3. He may sue for tithes, see Tithes, VII.; and have an action on the case for a disturbance in his office, *Herne's Pleader,* 86. Also for Money had and received against an usurper; 3 *Wils.* 355., provided he have the legal possession, *Powel* v. *Milbank,* 1 *T. R.* 399. It has been decided, that a *mandamus* lies to a bishop to induct a man into his prebend. 15 *Vin. Ab.* 193. Also to institute, induct, and admit him therein, although it was opposed that this was turning the common law remedy into another channel. *Clarke* v. *Bishop of Salisbury, Str.* 1082. This case was doubted, 1 *T. R.* 401. *n.*, see 2d vol. 61. *n.*, 89. *n.* Also to restore a clerk to the place and office of curate. *Rex* v. *Blooer,* 2 *Bur.* 1043. *infra,* 2d vol. 58, 59. Also after election to restore a dissenting minister to the use of a pulpit. *Rex* v. *Barker et al.,* 3 *Bur.* 1265. 1 *Bla. Rep.* 300. 352. So for a chaplain when the visitatorial power is suspended by the union of the office of visitor to that to which the mandamus is to be directed, *Rex* v. *Bishop of Chester,* 2 *Str.* 797. But not after his expulsion, because it did not appear that he had complied with all the requisites necessary to give him *prima facie* title. *Rex* v. *Jotham,* 3 *T. R.* 575. So it was refused by *Ashhurst* and *Buller* Justices, to compel the bishop to license a curate who had been nominated, because the party had a specific remedy by *quare impedit. Rex* v. *Bishop of Chester,* 1 *T. R.* 396. Which reason seems

The *writ of right of advowson* (6) (breve de recto advocationis) was so called from those words in the writ, whereby it is commanded, *quod plenum rectum teneas de advocatione.* By this the inheritance of the advowson might be recovered, but the incumbent could not be removed. *Gibs.* 784.

And this writ lieth only for him that hath an estate, or right of estate, in the advowson, to him and his heirs in fee-simple; and is disturbed to present upon an avoidance; having not brought any action of *quare impedit* or *darrein presentment* within six months. *Godolph. Repertorium Canonicum,* 648. (7)

Darrein presentment is a writ which lieth, where a man *or his ancestor* (8) hath presented a clerk to a church, and afterwards [31] (the church becoming void by the death of the said clerk or otherwise) a stranger presenteth his clerk to the same church, in disturbance of him who had last or whose ancestor had last presented. *T. L. Com. Dig. Quare impedit.* (*C.* 1, 2, 3.)

Quare impedit is a writ which lieth also, where one hath an advowson, and the parson dies, and another presents a clerk, or disturbs the rightful patron to present. And this writ was provided chiefly for the sake of *purchasers* of advowsons, who could not have the writ of *darrein presentment*; but so, that all who may have that writ, may have this of *quare impedit,* if they please. *T. L.* and 2 *Inst.* 356. (9)

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to be adopted in *The King* v. *Marquis of Stafford and another,* 3 *T. Rep.* 646. See also *The King* v. *The Bank of England, Dougl.* 524. For the Remedy by *duplex querela,* see Benefice, *Refusal,* 3., and *tit.* Double Quarrel.

(6) By the common law in all cases where the church was full by institution against a common person, or by institution and induction against the King, the rightful patron would lose the advowson if he did not recover the inheritance of it by a writ of right of advowson. *Boswell's* case, 6 *Rep.* 49. 2 *Inst.* 357, 358. Though the presentation on which the church was full, was made by usurpation, or though the patron was an infant, feme covert, &c. 6 *Co.* 49. See further *Comyn's Digest,* tit. Quare Impedit, (B. 1.), and the proceedings in this writ, *id.* (B. 2.)

(7) But a purchaser cannot have a writ of right of advowson, without alleging presentation in his own time. 2 *Inst.* 355., and see *infra,* page 43.

(8) But *semb.* that no man can have an assize of *darrein presentment,* without alleging a presentation in his *own* time. 2 *Inst.* 355., and see *infra,* page 43.

(9) If the right of nomination is in one, and of presentation in another, and either impedes the other in his right, a *quare impedit* lies. *Rex* v. *Marquis of Stafford,* 3 *Term Rep.* 646., and the party in whom the right of presentation is, is to judge of the qualification of the person nominated in the same manner as a bishop does: but if he object to the nominee on the ground of immorality, that must

Unto the writ of right of advowson belongeth the writ of *indicavit*, which is a writ of prohibition that lieth for the patron of a church, whose clerk is defendant in the ecclesiastical court in an action for tithes, commenced by another clerk, and extending to the fourth part of the value of the church at least. *T. L. Cod.* 721. *F. N. B.* 30.

This writ is not returnable; but if they cease not their suit, he shall have an attachment. *T. L.*

But at this day writs of *indicavit* and of right of advowson (as well as all other real actions) are grown almost obsolete, and seldom put in practice. *Deg.* p. 2.

In pursuance of the writs of *darrein presentment* and *quare impedit*, there is another writ called *ne admittas*; which is where one hath an action of *darrein presentment* or *quare impedit*, depending in the common pleas, and he supposeth that the bishop will admit the clerk of the defendant pending the plea betwixt them: in such case a writ issues to the bishop, requiring him not to admit a parson to such a church, until the right shall be determined. *Fitzherb. Natura Brevium*, 87.

And the writ of *ne admittas* must be sued within the six months after the avoidance; for after the six months a man shall not have this writ, because then the bishop may collate for lapse; and therefore it is in vain then to sue for the writ, because the title to present is devolved to the bishop. *F. N. B.* 87.

And if, notwithstanding the *ne admittas*, the bishop doth admit the clerk of any other person, pending the suit, and he who brought the *ne admittas* doth recover; then he shall have a writ of *quare incumbravit* to the bishop, that he appear and shew *why he hath incumbered* the church. *F. N. B.* 111.

And if it be found by verdict, that the bishop hath incumbered the church, after a *ne admittas* delivered to him, and within six months after the avoidance; damages are to be
[32] awarded to the plaintiff, and the bishop directed to disincumber the church. *F. N. B.* 111.

Quare non admisit is a writ that lies where a man hath recovered an advowson, and sends his clerk to the bishop to be admitted, and the bishop will not receive him; then he shall have the said writ against the bishop. *T. L.*

By the statute of magna charta, 9 H. 3. c. 13., *Assises of darrein presentment shall be always taken before the justices of the bench, and there shall be determined.*

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be tried by a jury, *id.* 648. *Quare impedit* lies for a church and hospital: and the objection that the one is ecclesiastical and the other temporal, is of no weight. *Mayor, &c. of Bedford* v. *Bishop of Lincoln, Willes' Rep.* 608, and 610., note.

The reason of which was for expedition, that lapse might not incur. 2 *Inst.* 27.

By the 13 *Ed.* 1. *West. Sec. c.* 30. *s.* 2. assizes of *darrein presentment*, and inquisitions of *quare impedit*, shall be determined in their own shire before one justice of the bench, and one knight, at a day and place certain in the bench assigned, whether the defendant consent or not; *and there the judgment shall be given immediately.*

The reason of making this statute was in respect of the danger of lapse; and therefore in favour of the patrons it is provided that the justices of *nisi prius* shall have power to give judgment in these two actions. 2 *Inst.* 424.

And although the words be, that there the judgment shall be given immediately; yet if the justices of *nisi prius* do not give judgment, upon the return of the *postea*, judgment may be given by the court to which the return is made: for by these words the higher court is not restrained. 2 *Inst.* 424.

And this act, giving to the justices of *nisi prius* power to give judgment, they have thereby a power inclusive, as incident thereunto, given them to award execution, that is, a writ to the bishop. But that writ is not returnable: But after the record be returned into the common bench, if the former writ be not executed, that court may grant a writ of *sicut alias*, returnable into that court. 2 *Inst.* 424.

[By the statute 14 *Ed.* 3. *st.* 1. *c.* 16. the justices of both benches, the chief baron, and the justices of *nisi prius*, may give their judgments in the country in assizes of *darrein presentment* and *quare impedit*, and return the same according to 12 *Ed.* 2. *st.* 1. *cc.* 3, 4.]

By the 52 *H.* 3. *c.* 12. *in assises of* darrein presentment, *and in a plea of* quare impedit, of churches vacant, *days shall be given from fifteen to fifteen*, or from three weeks to three weeks, as the place shall happen to be near or far. And *in a plea of quare impedit, if the disturber come not* at the first day that he is summoned, *nor cast no essoin*, then he shall be attached at another day; at which day if he come not, *nor cast no essoin*, he shall be distrained by the great distress; and if he come not then, by his default, *a writ shall go to the bishop* of the same place, that the claim of the disturber for that time shall not be prejudicial to the plaintiff: saving to the disturber his right at another time, when he will sue therefore.

In assises of darrein presentment *and in a plea of* quare impedit] This act extendeth not to a writ of *quare non admisit*, nor to an *incumbravit;* but only to the assise of *darrein presentment* and *quare impedit;* and the reason thereof is, for fear of the lapse. 2 *Inst.* 124.

Days shall be given from fifteen to fifteen] By assent of parties, a longer day may be given than is prescribed by this act; but that assent must be entered of record. 2 *Inst.* 124.

And it is to be observed, that by the common law, great delays are disallowed in four kinds of actions, viz. in all writs of dower, *quare impedit*, assise of *darrein presentment*, and assise of novel disseisin; and therefore no protection shall be allowed, or *essoin de servitio regis* shall be cast in any of them. 2 *Inst.* 124.

In a plea of quare impedit *if the disturber come not*] At the common law, in a *quare impedit*, the process was summons, attachment, and distress infinite; which was mischievous in respect of the lapse: now it is provided, that if he appear not at the grand distress, judgment shall be given for the plaintiff, and a writ to the bishop awarded. 2 *Inst.* 124.

[33] *Nor cast no essoin*] Of essoins there have been five kinds, 1. *De servitio regis.* 2. *In terram sanctam.* 3. *Ultra mare.* 4. *De malo lecti*, called in the old books *essonium de resiantisa.* 5. *De malo veniendi:* and this last is the common essoin, which is intended in this act. 2 *Inst.* 125. (*x*)

In a *quare impedit* or *darrein presentment* an essoin of the service of the king to the Holy Land, or beyond the sea, lieth not, for doubt of the lapse; but a common essoin lieth. 2 *Inst.* 125.

A writ shall go to the bishop] Upon these words of the act, the plaintiff shall have a writ to the bishop without making of any title. 2 *Inst.* 125.

And he shall have also besides, a writ to inquire of damages. 2 *Inst.* 125.

If the bishop be out of the realm, a writ to the bishop may be awarded to his vicar-general, for he is in the place of the bishop. 2 *Inst.* 125.

If the defendant appear at the grand distress, and take a day by *prece partium*, and after make default; no writ shall be awarded to the bishop: for this case, in respect of his appearance, is out of the statute. But a new distress shall be awarded. 2 *Inst.* 125.

By the 3 *Ed.* 1. *c.* 51. Forasmuch as it is great charity to do right unto all men at all times, when need shall be; *by the assent of all the prelates* it is provided, that assises of novel disseisin, mortdauncestor, and *darrein presentment shall be taken in Advent, Septuagesima, and Lent*, even as well as inquests may be taken; and that at the special request of the king made unto the bishops.

By the assent of all the prelates] Which is expressed, not that the prelates assented alone, but to manifest that this act, concerning the crossing of a canon of the church, was enacted by their assents. 2 *Inst.* 265.

(*x*) See tit. Essoin.

Shall be taken in Advent, Septuagesima, and Lent] The cause of the making of this statute doth manifestly appear by Britton, who being bishop of Hereford, and expert both in the common and canon law, in his chapter of the challenge of jurors, saith thus: "If sufficient jurors appear, some are removeable for "just challenge of the parties, and also in respect of the time; "for all things are not fit for all seasons: for it is forbidden by "the canons of holy church upon pain of excommunication, "that from the Septuagesima until eight days after Easter, and [34] "from the beginning of Advent until eight days after the "Epiphany, or in the days of the four times (that is, the ember "days appointed for public fasts four times in the year), or in "the days of the great letanies, or in rogation or gange days, "or in the week of Pentecost, or in time of harvest, or of "vintage, which endureth from the feast of St. Margaret (which "is the twentieth of July), until fifteen days after the feast of "St. Michael the archangel, or in the solemn feasts of the acts "of saints, no man be sworn upon the holy Evangelists, nor "any secular plea be holden in the times aforesaid; but that "all these times be given for prayer to God, and to appease "debate, and to accord them that be at discord, and to gather "the fruits of the earth whereof the people may live, which are "works of piety and charity." 2 *Inst.* 264.

By the 13 *Ed.* 1. *West. Sec.* *c.* 5. Whereas of advowsons of churches there be but three original writs, that is to say, one writ of right and two of possession, which be *darrein present-ment* and *quare impedit;* and hitherto it hath been used in the realm, *that when any having no right to present, had presented to any church whose clerk was admitted, he that was very patron could not recover his advowson, but only by a writ of right, which should be tried by battel or by great assise;* whereby heirs within age, by fraud, or else by negligence of their wardens, and heirs both of great and mean estate, by negligence or fraud of tenants by the curtesy, women tenants in dower, or otherwise for term of life, or for years, or in fee-tail, were many times disinherited of their advowson, or at least (which was the better for them) were driven to their writ of right, in which case hitherto they were utterly disinherited; *It is provided, that such presentments shall not be so prejudicial to the right heirs, or to them unto whom such advowsons ought to revert after the death of any persons;* for as often as any, having no right, doth present during the time that such heirs are in ward, or during the estates of tenants in dower, by the curtesy, or otherwise for term of life, or of years, or in tail, at the next avoidance, when the heir is come to full age, or when after the death of the tenants before-named, the advowson shall revert unto the heir being of full age, he shall have such action by writ of advowson possessory, as the last ancestor of such an

heir should have had at the last avoidance happening in his time, being of full age before his death, or before the demise was made for term of life, or in fee-tail, as before is said. *The same shall be observed in presentments made unto churches, being of*
[35] *the inheritance of wives*, what time they shall be under the power of their husbands, which must be aided by this statute by the remedy aforesaid. *Also religious men, as bishops, archdeacons, parsons of churches, and other spiritual men, shall be aided by this statute*, in case any having no right to present, do present unto churches belonging to prelacies, spiritual dignities, parsonages, or to houses of religion, what time such houses, prelacies, spiritual dignities, or parsonages be vacant. *s.* 1.

Neither shall this act be so largely understood, that such persons for whose remedy the statute was ordained shall have the recovery aforesaid, surmising that guardians of heirs, tenants in tail by the curtesy, tenants in dower, for term of life, or for years, or husbands, which faintly have defended pleas moved by them, or against them; because the judgments given in the king's courts shall not be adnulled by this statute, the judgment shall stand in his force, until it be reversed in the court of the king as erroneous, if error be found; or by assise of *darrein presentment*, or by inquest by a writ of quare impedit, if it be passed, or be adnulled by attaint, or certification, which shall be freely granted. And from henceforth one form of pleading shall be observed among justices in writ of *darrein presentment* and *quare impedit*, in this respect, if the defendant allegeth plenarty of the church of his own presentation, *the plea shall not fail by reason of the plenarty; so that the writ be purchased within six months*, though he cannot recover his presentation within the six months. And where it chanceth, that after the death of the ancestor of him that presented his clerk unto a church, the same advowson is assigned in dower to any woman, or to tenant by the curtesy, which do present, and after the death of such tenants *the very heir is disturbed to present* when the church is void; it is provided, that from henceforth it shall be in the election of the party disturbed, whether he will sue a writ of a *quare impedit*, or of *darrein presentment*. The same shall be observed in advowsons demised for term of life, or years, or in fee-tail. *s.* 2.

And from henceforth in writs of *quare impedit* and *darrein presentment*, *damages shall be awarded*, that is to wit, if the time of six months pass by the disturbance of any, *so that the bishop do confer to the church*, and the very patron loseth his presentation for that time, damages shall be awarded *for two years' value of the church*. And if the six months be not passed, but the presentment be deraigned within the said time, then damages shall be awarded to the half year's value of the church. And if the dis-

turber have not whereof he may recompence damages, in case where the bishop conferreth by lapse of time; he shall be punished by two years' imprisonment; and if the advowson be deraigned within the half year; yet the disturber shall be [36] punished by the imprisonment of half a year. *s.* 3.

And from henceforth writs shall be granted for chapels, prebends, vicarages, hospitals, abbies, priories, and other houses, which be of the advowsons of other men that have not been used to be granted before. And when the parson of any church is disturbed to demand tithes in the next parish by a writ of indicavit, the patron of the parson so disturbed *shall have a writ to demand the advowson of the tithes* being in demand; and when it is deraigned, then shall the plea pass in the court christian, as far forth as it is deraigned in the king's court. *s.* 4.

S. 1. *That where any having no right to present, had presented*] By this it appeareth, that no plenarty doth put the patron that hath title to present out of possession, but only plenarty by presentation: but plenarty by collation doth put him that had right to collate out of possession. 1 *Inst.* 344. 2 *Inst.* 356.

Had presented to any church] This is intended of a church presentative. 2 *Inst.* 356.

Whose clerk was admitted] Albeit that *admitted* in its proper sense is, when the bishop upon examination findeth him able, yet here it is taken for institution; because that before institution, the rightful patron is not put out of possession. And it is to be observed, that by the institution, the church, as to all common persons, is full as to the spirituality, that is, the cure of souls, which the bishop by the act of institution hath committed to him; but before induction the parson hath not the temporalities belonging to his rectory. 2 *Inst.* 356.

But the church is not full against the king, before induction; because in the king's case plenarty is to be intended of a full and complete plenarty, as well to the temporalities as to the spiritualty. 2 *Inst.* 356.

And if there be an usurpation upon the king, by a complete plenarty; the king cannot present to the church before he hath removed the incumbent by *quare impedit*, lest contentions might grow in the church between the several claimers of the benefice to the disturbance or hinderance of divine service; and this was by the common law. 2 *Inst.* 357.

But in that case, the king is only put out of possession as to the bringing of an action; but the inheritance of the advowson is not devested out of him. 2 *Inst.* 357.

He that was very patron could not recover his advowson] At the common law, if a stranger had presented his clerk, and he had been admitted and instituted to a church, whereof any subject [37] had been lawful patron: the patron had no other remedy to re-

cover his advowson, but a writ of right of advowson, wherein the incumbent was not to be removed. And so it was at the common law, if an usurpation had been had upon an infant or *feme covert*, having an advowson by descent, or upon tenant for life, or the like; the infant, *feme covert*, and he in the reversion, were driven to their writ of right of advowson; for at the common law, if the church were once full, the incumbent could not be removed, and plenarty generally was a good plea in a *quare impedit* or assise of *darrein presentment*, and the reason of this was, to the intent that the incumbent might quietly intend and apply himself to this spiritual charge; and the law did intend, that the bishop that had cure of souls within his diocese, would admit and institute an able man for the discharge of the spiritual function, and that the bishop would do right to every patron within his diocese. But at the common law, if any had usurped upon the king, and his presentee had been admitted, instituted, and inducted (for without induction the church had not been full against the king), the king might have removed him by *quare impedit*, and have been restored to his presentation; for therein he hath a prerogative, that *nullum tempus occurrit regi;* but he could not present, for the plenarty barred him of that, neither could he remove him any way but by action, to the end the church might be the more quiet in the mean time; neither did the king recover damages in his *quare impedit* at the common law. But this statute hath altered the common law in all these cases. 1 *Inst.* 344. 2 *Inst.* 356.

But only by a writ of right] This is to be understood, where the patron had a fee-simple, and that he or some of his ancestors had presented: but if the patron claimed the fee-simple of the advowson by purchase, and had never presented; there he could have no writ of right of advowson, but before this statute had lost the advowson. And likewise if tenant in tail, or tenant for life, had suffered any usurpation; they had been remediless by the common law because they could have no writ of right. 2 *Inst.* 357. 359.

Which should be tried by battel] This is an ancient trial in our law, which the defendant might chuse in divers cases, as especially here in a writ of right. (*y*)

[38] *Or by great assise*] This, in general, is a writ that lies, where any man is put out of his lands or tenements, or of any profit to be taken in a certain place; and so, disseised of his freehold. *Terms of the L.*

It is provided, that such presentments] The words before going, to which these have reference, extend only to heirs in ward;

(*y*) For the description of this trial, see 3 *Bl. Com.* 338. [No wager of, or trial by battel can now be had. 59 Geo. 3. *c.* 46. *s.* 2.: and see *Ashford* v. *Thornton*, 1 *Bar. & Ald. Rep.* 405.]

but these words are to be expounded of such presentments as are within the same mischief: and therefore this act extends to heirs of advowsons, though they be out of ward. 2 *Inst.* 357. [359.]

Shall not be so prejudicial to the right heirs] This act relieveth only infants [and *femes covertes*] that have advowsons by descent; for if an infant [or *feme coverte*] hath an advowson by purchase, he remaineth at the common law, and is not remedied by this act. 2 *Inst.* [353. 357. 358. *Jones*, 49.]

And this being a law that suppresseth wrong, and advanceth right, doth bind the king, though he be not named in the act. 2 *Inst.* 358.

Or to them unto whom such advowsons ought to revert after the death of any persons] That is, to those heirs that have the reversion of the advowson by descent; but the heir of him in the remainder is not within the purview of this act. 2 *Inst.* 358. (1)

After the death of any persons] That is, of tenant by the curtesy, tenant in dower, or otherwise for life, or for years, or in fee-tail. 2 *Inst.* 358, 359. [or tenant by statute merchant, staple or *elegit.* 2 *Inst.* 359. *Jones*, 48.]

The same shall be observed in presentments made unto churches being of the inheritance of wives] But if a *feme covert* hath an advowson by purchase, and not by inheritance; she is not within the remedy of this act. 2 *Inst.* 359.

Also religious men, as bishops, archdeacons, parsons of churches, and other spiritual men shall be aided by this statute] By this presentation and usurpation in time of vacation (2), albeit the freehold and inheritance is in abeyance; yet the usurper gaineth a fee-simple in the advowson: like as if one entereth into lands during the vacation, and claimeth the same as his inheritance, he gaineth an inheritance by wrong. But yet as the dying seised of lands in that case during the vacation shall not take away the entry of the successor, no more shall the usurpation during the vacation take away the right of presentation when the church

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(1) And this though the ancestor *purchased* and never presented. 2 *Inst.* 359. Again, *quare impedit* lies by the successor of him in reversion if an usurpation be on the lessee, &c. of an ecclesiastical person, *Semb. Dalton* v. *Bishop of Ely*, *Jones*, 48. But the reversioner himself taking by purchase is not within the statute, being the grantor, though his heir is, and may present and have *quare impedit.* 2 *Inst.* 359. *semble.*

(2) Thus, if an usurpation is on a bishop or other ecclesiastical person, his successor shall not have a *quare impedit*, for the statute aids only upon an usurpation in the vacation, or when the ancestor could not have remedy at the time of the usurpation, *semb. Dalton* v. *Bishop of Ely*, *Jones*, 47. 49. *F.N.B.* 34. *M.*

becomes void: and if he be disturbed he shall have his *quare impedit*. 2 *Inst.* 359.

• S. 2. *The plea shall not fail by reason of the plenarty*] By the common law, plenarty before the writ of *quare impedit* brought
[39] was a good plea, but plenarty hanging the writ was no bar at the common law; but now by this statute, plenarty is no plea in a *quare impedit* or *darrein presentment*, unless it be by the space of six months before the *quare impedit* brought; for if the rightful patron bring his action within six months, it is maintainable by this statute; which short purview doth remedy many mischiefs at the common law. 2 *Inst.* 360.

But this doth not bind the king: for plenarty by the space of six months is no bar against him, for he may have his *quare impedit* when he will; and that, whether he claimeth in the right of his crown, or in the right of a subject. 2 *Inst.* 360. (*z*)

So that the writ be purchased within six months] And because this computation doth concern the church, it is great reason that it shall be made according to the computation of the church, which churchmen do best know: and therefore the computation shall be made according to the kalendar for one half year; and not accounting twenty-eight days to the month. 2 *Inst.* 360. (3)

The very heir is disturbed to present] Hereby the heir in reversion is provided for, and not the lessor himself. And albeit tenant by curtesy, tenant in dower, tenant for life, or tenant in tail presented last; yet the heir to whom the reversion falleth in possession, shall have by this branch an assise of *darrein presentment*, albeit the heir or his ancestor did not immediately present before. 2 *Inst.* 361.

S. 3. *Damages shall be awarded*] Before the making of this act, the plaintiff in a *quare impedit* recovered no damages, lest any profit the patron should take should savour of simony, which the common law did detest. And this is the cause that the king in a *quare impedit* recovereth no damages; because he could recover none by the common law, and the king is not within the purview of this clause. 2 *Inst.* 361.

And forasmuch as no damages were in a *quare impedit* at the

(*z*) As *e.g.* in right of a ward. *Ibid.*

(3) That a *quare impedit* cannot issue after six months where a person has been presented to a living by one who has not a right, is a rule very proper to be adopted in equity, because it is the general rule that equity follows the law, whether originally a resolution of common law or introduced by statute. The 13 *Ed.* 1. *c.* 5. was intended to secure the peace of the church, and being considered as a statute of limitation, is a bar of an equitable as well as legal right; and therefore a plea of plenarty of six months and upwards will be allowed. *Boteler* v. *Allington*, 3 *Atk.* 455. And see *Gardiner* v. *Griffith*, *ante*, 19.

common law, and this act after the statute of Glocester (which gave costs in certain cases) giveth damages only; therefore in this case the plaintiff shall recover no costs. 2 *Inst.* 362.

But in the case of *Holt* and *Holland*, *M.* 33 *C.* 2. where the question was, whether the plaintiff in a *quare impedit* should have costs, it was ruled, that if it is a *quare impedit* by the common law, there can be no costs; if by statute, there must be [40] costs; and if the church is full of the defendant by institution, then it is a *quare impedit* within this statute of the 13 *Ed.* 1. *c.* 5. if not, it is at the common law. *Skin.* 25. (*a*)

So that the bishop do confer to the church] Albeit the bishop hath not collated, yet if he hath the right of collation, the plaintiff shall, if he will, recover double damages, within the meaning of this act. But if notwithstanding the bishop's title to collate, the *church remaineth void*, the plaintiff may recover his presentation; and if he doth, the damages shall be only for half a year: in which case he hath his election, either to lose his presentation, and have double damages, or to have his presentation with single damages. (*b*) 2 *Inst.* 362.

For two years' value of the church] And this shall be accounted according to the true value, as the same may be letten. 2 *Inst.* 362.

S. 4. *Shall have a writ to demand the advowson of the tithes*] By the common law, if the incumbent of one patron demanded tithes against the incumbent of another patron, the writ of *indicavit* did lie; for that the right of the patronage should come in question: for by the presentation of the patron, his incumbent is to have the tithes, which are the profits of the church. And in a writ of right of advowson, the patron shall allege the esplees (or profits) in his incumbent in taking of the great and small tithes; and therefore if the right of tithes came in question, that concerned the right of advowson, the writ of *indicavit* did lie. 2 *Inst.* 363.

The mischief before this statute was, that seeing the right of tithes could not be tried between the two persons after the *indicavit* granted, the person prohibited was without remedy for trial of the right of tithes; and therefore this act doth give the

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(*a*) By the latter authorities no costs are given in a *quare impedit. Bull. N. P.* 328. *Sayer on Costs,* 6. *Hullock on Costs,* 7. Even though the defendant have judgment on demurrer. *Thrale and others* v. *the Bishop of London and others,* 1 *H. Bla.* 530. For the stat. 8 & 9 *W.* 3. *c.* 11. which gives costs on demurrer, is construed to give them in such cases only where both parties are entitled to them. But on a writ of error the plaintiff is entitled to costs and damages, by 3 *H.* 7. *c.* 10. if judgment be affirmed, or the writ be discontinued, or defendant nonsuited. *Vide infra,* p. 46. note (*b*).

(*b*) In such case *no* damages, vide 3 *Lev.* 59. Serjt. *Hill's* MSS.

patron, whose clerk is prohibited, a writ of right of advowson
[41] of tithes; and if the right be tried for the demandant, the cause shall be removed into the court christian. 2 *Inst.* 363.

But what if the patron hath but an estate for life, so as he cannot have this writ of right of advowson; what remedy shall be had for trial of the right of tithes in this case? It seemeth that by construction of this statute, the defendant in the *indicavit* appearing upon the attachment, shall plead to the right of the tithes in the king's court: or otherwise he shall be without remedy. 2 *Inst.* 364.

By the 34 *Ed.* 1. *st.* 1. (*de conjunctim feoffatis*): Forasmuch as pleas in courts spiritual heretofore had many times unmeet delays, for that our writ that is called *indicavit* was many times brought before the judges, of such matters when they were begun, and thereupon our chief justices could not proceed lawfully nor in due manner to award a writ of consultation upon such manner of process; it is agreed, that such a writ of *indicavit* shall not be granted from henceforth to any, before the matter hanging in the spiritual court between the parties be recorded, and that our chancellor shall be certified thereof, by the sight and inspection of the libel.

[42] By the statute of *articuli cleri*, 9 *Ed.* 2. *st.* 1. *c.* 2. If debate do arise upon the right of tithes, having its original from the right of patronage, and the quantity of the same tithes do come unto the fourth part of the goods of the church; the king's prohibition shall hold place, if the cause come before a judge spiritual.

By the 12 *Ed.* 2. *c.* 4. As to the inquests to be taken upon writs of *quare impedit*, it shall be done as is contained in the statute of the 13 *Ed.* 1. *st.* 1. *c.* 30. And the justices shall have power to record nonsuits and defaults in the country, and to give judgment thereupon, as they do in the bench, and there to report that which they have done, and there to be enrolled. And if it happen that the justice or justices that shall be assigned to take such inquests in the country do not come, or if they come into the country at the day assigned, yet the parties and persons of such inquests shall keep their day in the bench.

By the 1 *Mar. sess.* 2. *c.* 5. Whereas by the statute of the 32 *H.* 8. *c.* 2. in some cases prescription is limited to sixty years, and in other cases to fifty years, which being not disproved shall after trial had be a bar for ever to all writs in such cases; and a doubt hath been whether the same shall extend to a writ of right of advowson, a *quare impedit, jure patronatus*, or assise of *darrein presentment*, where the claimant cannot lay the esplees, seisin, or presentment in him, his ancestors, or predecessors, or in him or them by whom they claim, within sixty years next before: it is enacted, that the same shall not extend to any writ of right of advowson, *quare impedit*, or assise of *darrein presentment*,

nor *jus patronatus;* but that all persons may maintain and pursue the same as they might have done before the making of the said act.

It hath been generally received for law, that if one who is not a rightful patron doth in due form of law, without any corrupt contract, present a clerk to a presentative living, in the time of peace, (when the courts are open, and consequently the rightful patron is at liberty to bring his *quare impedit* within the six months if he pleaseth,) and such presentation taketh effect, and institution and induction be had thereupon, and the clerk remains six months in possession before the true patron commenceth his suit; he thereby becomes a lawful incumbent, and may enjoy the living during his life. And although formerly the true patron might, on the next avoidance, recover his ancient right in many cases, yet he could not do it in all; but [43] in some was for ever barred of any remedy. (*c*) But now by the statute of the 7 *Ann. c.* 18. Forasmuch as the pleading in a *quare impedit* is found very difficult, whereby many patrons are either defeated of their rights of presentation, or put to great charge and trouble to recover their right; it is therefore enacted, *that* no usurpation upon any avoidance in any church, vicarage, or other ecclesiastical promotion, shall displace the estate or interest of any person entitled to the advowson or patronage thereof, or turn it to a right; but he that would have had a right if no usurpation had been, may present or maintain his *quare impedit* upon the next or any other avoidance (if disturbed) notwithstanding such usurpation. *Wats. c.* 7. (4)

[By *stat.* 13 & 14 *Car.* 2. *c.* 25., all advowsons, rectories, impropriate glebe lands and tithes taken from H.M.'s loyal subjects, by the usurped power of the Long Parliament, were restored to them.]

By the 20 *G.* 2. *c.* 52. *All titles and suits and actions of quare impedit*, are excepted out of the general pardon granted by that act (to all persons concerned in the late rebellion).

By the 24 *G.* 2. *c.* 48. intituled, An act for the abbreviation of Michaelmas term:—Whereas before the making of this act, all writs of summons to warrant against the vouchers upon common recoveries had, in writs of entry, and writs of right of advowson were made for five returns inclusive: for the more speedy perfecting of such recovery, it is enacted, that every such writ of

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(*c*) See *Hob.* 322. who says, that an advowson is one of the things whereupon usurpation works more violently than upon any possession corporal.

(4) The *stat.* 7 *Ann. c.* 18., enacting that the interest of the patron of an advowson shall not be displaced by usurpation, is not retrospective. *Attorney General* v. *Bishop of Litchfield*, 5 *Ves.* 828.

summons, to warrant upon the appearance of the tenant to every such writ of entry and writ of right of advowson, shall be abridged to four returns inclusive. *s.* 8.

An assise of *darrein presentment* no man can have, without alleging a presentment in his own time. 2 *Inst.* 355.

A writ of right of advowson a *purchaser* cannot have, without alleging a presentation in his own time: but a *quare impedit* a purchaser may have, and allege a presentation in him from whom he purchased the same; and to that end was the *quare impedit* provided, for remedy of such purchasers. 2 *Inst.* 355. 358.

And seeing the writ of *quare impedit* doth lie for all persons who may maintain an assise of *darrein presentment*, it seems to be the safest course to bring that writ upon any disturbance: but although it be said that a man may in many cases have either writ, yet in no case can he maintain both; therefore if [44] the plaintiff hath brought a *quare impedit* upon a disturbance, and hanging the same, doth bring an assise of *darrein presentment* against the same defendants, the defendants may in pleading shew this special matter in certain, and aver that both writs are upon the same avoidance; and the writ of *darrein presentment* will be abated. (*d*) And if an assise of *darrein presentment* be first brought, and after that a *quare impedit* for the same avoidance; the assise shall abate, and the *quare impedit* shall stand; for the *quare impedit* is of an higher nature than the assise. *Wats. c.* 22.

When by the judgment in a *quare impedit* the inheritance, estate, or interest of the patron that presented is to be divested, such patron ought to be named in the writ; because the patronage should else be recovered against him who had nothing in the patronage, namely, the clerk; and it is not reason that he who is patron should be dispossessed and ousted of his patronage, when he is stranger and not party to the action, especially when he may be made a party. *Wats. c.* 24. (*e*)

And not only the patron, but also his incumbent, must be named in the writ; for if an incumbent at the time of purchasing the original writ be admitted and instituted at the presentation of any one, although the ordinary and his patron be named, yet such incumbent that is not mentioned shall not be removed, but only the patronage recovered. *Wats. c.* 24. (*g*)

(*d*) *Hob.* 184. *Nemo debet bis vexari si constet curiæ quod sit pro una et eadem causa.* 5 Rep. 61. a.

(*e*) *Hob.* 193. *Cro. Jac.* 651. *aliter* where the presentation alone is to be recovered. *Saville, Cas.* 184. *Palm.* 311. When the patron is omitted, the incumbent must plead in abatement. *Hob.* 317.

(*g*) 6 *Rep.* 51. *b.* *Quia res inter alios acta alteri nocere non debet.*

And in some cases it is necessary also to name the ordinary in the writ; for if the patron be disturbed in presenting, and the church be not filled, the ordinary is to be named in the writ, or else he will collate hanging the suit by lapse; whereas if he be named, he must either disclaim, and then judgment may be had against him, or else he must plead, and so allow himself to be a disturber, and being made party to the action, he is barred of the advantage of lapse. *Wats. c.* 24. (*h*)

Quare impedit is a possessory action, and therefore not to be maintained without a possession; for which reason the plaintiff [whether he be the king, or a common person] must always declare upon a presentation made by himself or his ancestor, or one whose estate he hath, or by the grantee of the next avoidance, or by his lessee for life or for years. 3 *Salk.* 293. (4) [45]

But yet the want thereof may be cured by verdict. *Str.* 1006. (5)

In all writs of *quare impedit*, the test of the writ ought to be made the very day it is taken out, and not at any time before, and this by reason of the lapse. *Wats. c.* 23. (*i*)

The *process* in *quare impedit* are summons, attachment, and distress peremptory. And the sheriff must summon the defendant by good summoners, and return their names upon the original writ, and not return common summoners, as John Doe and Richard Roe; for a writ of deceit lieth, if the summons were not made indeed. But if the king be plaintiff and the defendant be not summoned, nor attached, nor distrained,

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(*h*) *Co. Lit.* 344. *b.*

(4) *Vaugh.* 17. 57. And see *Com. Dig. Pleader*, (3 I. 5.)

(5) So the plaintiff must allege a title to the advowson in some one from whom he claims by descent. *Digby* v. *Fitzharbert*, *Hobart*, 102. *Birch* v. *Bp. of Lichfield*, 3 *Bos. & Pul. Rep.* 444. And this though the ancestor took by purchase, and had never presented. 2 *Inst.* 359. But a bishop defendant cannot, after insisting on a right by lapse, and confessing and awarding a presentation stated by the plaintiff, object to the sufficiency of the right to present set out in the declaration. *Bp. of Salisbury* v. *Philips*, 1 *Lord Raym.* 535. 1 *Salkeld*, 43.

Plaintiff must allege a seisin in fee or for life, &c. See *Com. Dig. Pleader*, (3 I. 4.) Nonsuit after appearance is peremptory. *Beckley* v. *Hansard*, 2 *Salk. Rep.* 559. As to declaration, plea, replication, issue, judgment, &c. in general, in *quare impedit*, see *Com. Dig. Pleader*, (3 I. 3.) and (3 I. 6.)—(3 I. 12.) *Thrale* v. *Bp. of London*, 1 *Hen. Bla.* 376. *Birch* v. *Bp. of Lichfield, &c.*, 3 *Bos. & Pul.* 444. *Rex* v. *Archbp. of Armagh*, 2 *Stra.* 837. *Rex and another* v. *Bp. of London and another*, 2 *Salk. Rep.* 559. As to variance between declaration and writ, see *Bp. of Salisbury* v. *Philips*, 1 *Lord Raym.* 535. 1 *Salk.* 43.

(*i*) For if the writ abate, no new writ can be brought after the six months. 7 *Rep.* 27.

and the king hath judgment by default, no writ of deceit lieth. *Wats. c.* 26. (*k*)

By a constitution of archbishop Langton, If two are presented to one and the same church, the custody thereof shall be given to neither of them, pending the suit. And if the right of collating to such church shall lapse to the bishop; in such case, lest either of the parties should be prejudiced by the bishop's collation, who shall afterwards carry his cause as to the right of patronage, it is decreed, that the bishop shall collate neither of those who have been presented to the same church for that turn, unless by consent of both the patrons. *Lind.* 215.

And by the *statute* of the 3 *Ed.* 1. *c.* 28. None of the king's clerks, nor of any justicer, shall receive the presentment of any church, for the which any plea or debate is in the king's court, without special licence of the king; and that the king forbiddeth, upon pain to lose the church, and his service.

The mischief before which act was, that pending a suit for a church in the king's court, the one party or the other would present the chaplain of the king, or of some of the judges, the more to countenance the one party, and discourage the other; and at that time the mischief was greater, because if the clerk of an
[46] usurper was instituted, the true patron had no remedy, but by a writ of right of advowson. 2 *Inst.* 212.

And by the *statute* of the 13 *Ed.* 1. *st.* 1. *c.* 49. it is enacted as followeth: The chancellor, treasurer, justices, nor any of the king's counsel, nor clerk of the chancery, nor of the exchequer, nor of any justice or other officer, nor any of the king's house, clerk nor lay, shall not receive any church nor advowson of a church, land nor tenement in fee, by gift nor by purchase, nor to farm, nor by champerty, nor otherwise, so long as the thing is in plea before us, or before any of our officers; nor shall take no reward thereof. And he that doth contrary to this act, either himself or by another, or make any bargain, shall be punished at the king's pleasure, as well he that purchaseth as he that doth sell.

In assise of *darrein presentment*, six of the jury ought to have the view of the church, to the intent that they may put the plaintiff into possession if he do recover. *Wats. c.* 26.

Judgment being given, the effects thereof are, that in an assise of *darrein presentment*, he that prevails shall recover the presentment, and six of the jury who had view of the church may put the plaintiff into possession if he doth recover. In a

(*k*) 1 *Brownlow*, 158. [*Dyer*, 353. *b.* 2 *Inst.* 126. And by the common law, before 52 *H.* 3. *c.* 12., *Stat. Marlbr.* the distress was infinite, *id.* 124. And see further, as to process in *quare impedit*, *Com. Dig. Pleader*, (3 I. 1, 2.)]

quare impedit (6), he that recovers, recovers the advowson as well as the presentment. But in both writs, by the very judgment absolutely given, there is this effect of the judgment, that the incumbent that was in a church when the writ was brought, if named in the writ, is actually removed; but if not named in the writ, he shall never be removed. *Wats. c.* 28. (*l*)

Another effect of a judgment given in a *quare impedit* or *darrein presentment* is, that he for whom the judgment is given shall recover as well his damages, as his presentment and advowson, by the aforesaid statute of the 13 *Ed.* 1. *st.* 1. *c.* 5. *Wats. c.* 28. (*m*)

And the recoverer shall have a writ to the bishop to admit his clerk. *Wats. c.* 28. [47]

By a constitution of archbishop Boniface, If when a man hath recovered his right of patronage in the king's court, *the king doth write to the bishop, or to any other who hath power to grant institution,* that he admit the clerk presented by such person having so recovered as aforesaid; the clerk presented *shall be freely admitted,* if the benefice be vacant, and there be no other canonical impediment, that the patron be not injured. But if the benefice be not vacant, the prelate may excuse himself to the king or his justices, by answering, that because the benefice is not vacant, he cannot therefore fulfil the king's mandate. But the patron may, if he pleaseth, present again the person who is in possession; that so the right of him who hath so recovered may be declared for the future.

The king doth write to the bishop] That is, by writ issuing out of his court. And if the bishop, upon receipt of the writ, doth not admit the clerk, another writ shall issue, which is called the writ of *quare non admisit.* *Wats. c.* 28.

And it is said, the very judgment in a *quare impedit* is an

(6) See as to judgment in *quare impedit, Com. Dig. Pleader* (3 I. 11.)

(*l*) 6 *Rep.* 51. *b.* *Cro. Car.* 348. *Vide supra, p.* 44. By 13 *Ed.* 1. *West.* 2. *c.* 30. the judge of *nisi prius* has power to give judgment immediately; yet if he do not, upon the return of the *postea,* judgment may be given by the court to which the return is made. *Bull. N.P.* 123.

(*m*) By 3 *H.* 7. *c.* 10. If the defendant bring a writ of error, and judgment be affirmed, or the writ be discontinued, or defendant nonsuited, the plaintiff shall recover his costs and damages for his wrongful delay. By virtue of this statute, the court of *K. B.* have, upon a writ of error, awarded damages according to the value of the church found by the verdict; but as the real damages which the plaintiff sustains is only the being kept out of the half-year's value, the legal interest on that seems to be all that he is entitled to. *Bull. N. P.* 125.

amotion of the incumbent, though he continue still the possession *de facto*; and if the plaintiff be instituted upon a writ to the bishop, the defendant cannot appeal; and if he doth, a prohibition lieth: because in this case the bishop acts as the king's minister, and not as a judge. 3 *Salk.* 294.

Or to any other who hath power to grant institution] As, the dean, or archdeacon, or other such like: who may have such power by custom, prescription, or special privilege. *Lind.* 217.

Shall be freely admitted] That is, without making any inquisition of the right of patronage; because it is enough that the king by his letters testifieth that he hath obtained the right of patronage in his court. *Lind.* 217.

After all, the learning concerning *darrein presentment* seems now to be entirely obsolete. Before the statute of the 7 *Ann.* abovementioned, the determination upon a *darrein presentment* was conclusive, as between the patron or his heirs and a
[48] stranger: for, till then, the full possession of the advowson was in him who presented last and his heirs; unless, since that presentation, the clerk had been evicted within six months, or the rightful patron had recovered the advowson in a writ of right, which is a title superior to all others. But that statute having given a right to any person to bring a *quare impedit*, and to recover (if his title be good) notwithstanding the last presentation, by whomsoever made; assises of *darrein presentment*, now not being in any wise conclusive, have been totally disused, as indeed they began to be before; a *quare impedit* being a more general, and therefore a more usual action. For the assise of *darrein presentment* lies only where a man hath an advowson by descent from his ancestors; but the writ of *quare impedit* is equally remedial whether a man claims title by descent or by purchase. 3 *Bla. Com.* 245.

Form of the grant of a perpetual advowson.

THIS *indenture made the* ——— *day of* ——— *in the* ——— *year of the reign of our sovereign lord* ——— *of Great Britain, France and Ireland king, defender of the faith, and so forth, and in the year of our Lord* ——— *Between* A. B. *of* ——— *in the county of* ——— *esquire, of the one part, and* C. D. *of* ——— *in the county of* ——— *gentleman, of the other part; Witnesseth, that the said* A. B. *for and in consideration of the sum of* ——— *of lawful money of Great Britain, to him in hand paid at or before the sealing and delivery hereof, the receipt whereof he the said* A. B. *doth hereby acknowledge and himself therewith fully satisfied and paid, and thereof and of every part thereof doth hereby acquit, release and for ever discharge the said* C. D. *his heirs,*

executors and administrators and every of them by these presents; And also for divers other good causes and valuable considerations him the said A. B. thereunto moving, he the said A. B. hath given and granted, and by these presents doth fully, freely and absolutely give and grant unto the said C. D. his heirs and assigns for ever, All that the advowson of the rectory or parsonage of E. in the county of —— And all the estate right title interest property claim and demand whatsoever of him the said A. B. of in and to the said advowson, and to the donation presentation and free disposition and right of patronage of the said church; To have and to hold the said advowson and premises aforesaid hereby given and granted, or meant mentioned or intended to be hereby given and granted, with
the appurtenances, unto him the said C. D. his heirs and assigns, to [49]
and for the sole and only proper use and behoof of the said C. D. his heirs and assigns for ever, and to and for no other use intent or purpose whatsoever. And the said A. B. hath granted, and by these presents doth grant for himself and his heirs, that they will warrant to the said C. D. and his heirs the aforesaid advowson of the said church and premises aforesaid and every of them, with the appurtenances, unto him the said C.D. his heirs and assigns, against him the said A. B. his heirs and assigns, and against all persons whatsoever claiming or to claim the same, or any right or title thereunto, by from or under him them or any of them. And the said A. B. doth hereby for himself his heirs executors and administrators, covenant promise grant and agree to and with the said C.D. his heirs executors administrators and assigns, and to and with every of them by these presents, in manner and form following: that is to say, that he the said A. B. is at the time of the sealing and delivery hereof, and until the execution of these presents, the true right and undoubted patron of the said church of E. and of the rectory aforesaid; and hath good right, full power, and lawful and absolute authority, to grant and convey the same to the said C. D. his heirs and assigns in manner and form as aforesaid: and that it shall and may be lawful to and for the said C. D. his heirs and assigns, from time to time, and at all times for ever hereafter, whenever the said church shall or may, by the death, resignation, deprivation, cession, or change of all or any the rectors or incumbents thereof, or otherwise, happen to become vacant, to present some other honest learned and well qualified clerk, to succeed in the said church as the rector or parson thereof, and to do all other acts which to the office of patron of the said rectory doth of right belong or appertain, as fully and amply as he the said A. B. his heirs or assigns might or could do, if these presents had not been made, without any let, suit, hindrance, molestation, interruption or disturbance whatsoever of or from him the said A. B. his heirs or assigns, or any other claiming under him, them, or any of them: And that he the said A.B. his heirs and assigns, and all other persons

whatsoever having or claiming any right or title to the said advowson under him or them, shall and will from time to time, and at all times hereafter, upon the reasonable request, and at the proper cost and charges of the said C. D. *his heirs and assigns, in the law, make, do, levy, execute and suffer all and every such further and other lawful and reasonable act and acts, grant and grants, conveyances and assurances in the law whatsoever, for the farther, better, and more perfect and absolute granting, conveying, and assuring of the said advowson of the said church to the said* C. D.
[50] *his heirs and assigns, be it by grant, confirmation, fine, or recovery, or in any other manner as by the said* C. D. *his heirs and assigns, or his or their counsel learned in the law, shall be reasonably devised advised or required: All which further and other assurance and assurances, so to be made of the said premises, shall be and enure, and shall be adjudged deemed and taken to be and enure, and are hereby declared to be and enure, to the sole only and proper use of the said* C. D. *his heirs and assigns for ever, and to and for no other use intent or purpose whatsoever. In witness whereof the parties aforesaid to these presents have interchangeably set their hands and seals, the day and year first abovewritten.*

Grant of a next avoidance.

THIS *indenture made the —— day of —— in the year of our Lord —— Between* A. B. *of —— in the county of —— gentleman, of the one part; and* C. D. *of —— in the county of —— gentleman, of the other part; Witnesseth, that the said* A. B. *for divers good causes and considerations him the said* A. B. *thereunto moving, hath given and granted and doth by these presents give and grant unto the said* C. D. *his executors administrators and assigns, the first and next donation nomination presentation and free disposition of the rectory or parsonage of the church of* E. *in the county of* F. *And that it shall and may be lawful to and for the said* C. D. *his executors administrators and assigns, whensoever, howsoever, and by whatsoever means, by death resignation privation cession permutation or by any other ways or means whatsoever, the aforesaid church of* E. *shall first or next happen to be void, to present any one fitting honest and learned man thereunto; and to do all other things which belong to the office and duty of a patron; and to do, for the fulfilling of such first and next vacation or avoidance only, as fully and amply, as he the said* A. B. *in that behalf might do if these presents had not been made. And the said* A. B. *doth hereby for himself, his heirs executors administrators and assigns, covenant promise and grant to and with the said* C. D. *his executors administrators and assigns, that he the said* A. B. *hath full power and lawful authority to give grant*

and dispose of the next presentation of and in the aforesaid rectory and church of E. *to the said* C. D. *his executors administrators and assigns as aforesaid. And further that he the said* A. B. *his heirs or assigns shall and will from time to time and at all times hereafter, at the reasonable request and costs and charges of him the said* C.D. *his executors administrators and assigns, make do and execute, or* [51] *cause to be made done and executed, such further and other reasonable act and acts, thing and things, conveyance and assurance in the law whatsoever, for the further better and more absolute giving and granting of the said next presentation of in and to the aforesaid rectory and church of* E. *unto him the said* C. D. *his executors administrators and assigns, as by him the said* C.D. *his executors administrators and assigns, or his or their counsel learned in the law, shall be reasonably devised or advised and required. In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first abovewritten.*

Agnus dei. See **Popery.**

Alienation of glebe lands. See **Glebe lands.**

Alimony. See **Marriage.**

Alms chest. See **Church.**

Altarage.

ALTARAGE comprehends not only the offerings made upon the altar; but also all the profit which accrues to the priest by reason of the altar, *obventio altaris*. God. Repertor. Canon. 339.

Out of these, the religious assigned a portion to the vicar; and sometimes the whole altarage was allotted to him by the endowment. *Id. Introd.* 51.

Since the reformation, divers disputes have arisen, what dues were comprehended under the title of *altaragium*; which were thus determined in a trial in the Exchequer, *M.* 21 *Eliz.* viz. Upon hearing of the matter, between *Ralph Turner*, vicar of West Haddon, and *Edward Andrews*; it is ordered, that the said vicar shall have by reason of the words *altaragium cum manso competenti* contained in the composition of the profits assigned for the vicar's maintenance, all such things as he ought to have by these words according to the definition thereof made by the reverend Father in God John bishop of London, upon

conference with the civilians, David Hewes judge of the admiralty, Bartholomew Clerk dean of the arches, John Gibson, Henry Joanse, Lawrence Hewes, and Edward Stanhope, all doctors of the civil law; that is to say, by *altaragium*, tithes of wool, lambs, colts, calves, pigs, goslings, chickens, butter, cheese, hemp, flax, honey, fruits, herbs, and such other small tithes, with offerings that shall be due within the parish of West Haddon. And the like was for Norton in Northamptonshire, in the same court within two or three years before, upon hearing, ordered in like manner. *Ken. Par. Ant.* Gloss. *God.* 339.

[52]

Yet it seems to be certain, that the religious when they allotted the altarage in part or in whole to the vicar or capellane, did mean only the customary and voluntary offerings at the altar, for some divine office or service of the priest, and not any share of the standing tithes, whether prædial or mixt. *Kent. Par. Ant.* Gloss.

And in the case of *Franklyn* and the master and brethren of *St. Cross*, *T.* 1721; it was decreed, that where *altaragium* is mentioned in old endowments, and supported by usage, it will extend to small tithes, but not otherwise. *Bunb.* 79. (*n*)

It is most probable, that the greatest annual revenue by *altars*, if not by *altarages*, in any one church within this realm, was in that of St. Paul, London. For when the chantries were granted to King Henry 8., whereof there were 47 belonging to St. Paul's, there were in the same church at that time no less than 14 several altars. And although they were but chantry priests that officiated at them, and had their annual salaries on that account, distinct from altarages in the proper sense of oblations; yet in regard these annual profits accrued by their service at the altar, they may not improperly be termed *pension altarages*, though not *oblation altarages*. *God. Introd.* 51.

Anabaptists. See Dissenters.

[53]

Anabata.

ANABATA, is a cope, or sacerdotal vestment, to cover the back and shoulders of the priest. *Kent. Par. Ant.* Gloss. *v.* Anabata.

(*n*) That this word is to be explained by usage, see also *Reynolds* v. *Green*, 2 *Bulstr.* 27. and *Het.* 137. to which add *Athon.* 12. and 18.

Annals.

ANNALS, were masses said in the Romish church, for the space of a year, or for any other time, either for the soul of a person deceased, or for the benefit of a person living, or for both. *Aylif. Parerg.* 190.

Anniversaries.

ANNIVERSARIES, were offices celebrated, not only once at the end of the year, as obits were; but were to be performed every day throughout the year, for the soul of the deceased. *Ayl. Parerg.* 190.

Answer.

AFTER contestation of suit, and the oath of calumny taken by both the litigants, the next thing which follows in course of practice, if a suit proceeds, is the demanding and giving in of personal answers. Which are made in writing to the several articles or positions of a libel, or to any other judicial matter exhibited in court.

And these answers ought to be made in very clear and certain terms; and upon the oath also of the person that exhibits them, unless it be in a criminal cause, wherein no one is bound to accuse himself. (7)

For personal answers are therefore provided in law, that by the help of them the adverse party may be relieved in the matter of proof. And if these answers are not clear, full, and certain; [54] they are deemed and taken in law as not given at all: and upon a motion made, the judge ought, by an interlocution, to enjoin

(7) In criminal suits the defendant's answers on oath are not to be required, even to those positions which are not in themselves criminatory. *Schultes* v. *Hodgson*. 1 *Addams's Rep*. 105. 13 *Car*. 2. *c*. 12. *s*. 4. superseding *Oughton*, tit. 66. 141, 142. And if the ecclesiastical court should proceed to enforce answers in such suit, prohibition lies, *Goulson* v. *Wainwright*. 1 *Sid*. 374.

Whatever is to be done *personally* by a principal in the cause, requires personal service of the notice or decree for doing it on the principal. Therefore service of a decree for answers upon the *proctor* will not justify the court in putting the *principal* in contempt, if those answers are not brought in. *Durant* v. *Durant*. 1 *Add. Rep*. 114.

new answers: it being the same thing to give no answer at all, as to give a general and insufficient answer. (*o*)

A personal answer therefore ought to have these three qualities in it; First, it ought to be pertinent to the matter in hand. Secondly, it ought to be absolute and unconditional. And, thirdly, it ought to be clear and certain. *Ayl. Parerg.* 65.

Antiphonar.

THE antiphonar, *antiphonarium*, from αντι, *contra*, and φωνη, *sonus*, is that book which containeth the invitatories, responsories, verses, collects, and whatever is said or sung in the quire, called the seven hours, or breviary. *Lind.* 251.

Apparitor.

Who.

1. APPARITORS (8) (so called from that principal branch in their office, which consisteth in summoning persons to *appear*) are officers appointed to execute the proper orders and decrees of the court. *Ayl. Parerg.* 67.

How appointed.

2. And these are chosen by the ecclesiastical judges respectively; who may suspend them for misbehaviour, but may not remove them at discretion, as they most of them hold their office by patent.

His office and duty.

3. The proper business and employment of an apparitor is, to attend in court, to receive such commands as the judge shall please to issue forth; to convene and cite the defendants into court; to admonish or cite the parties in the production of witnesses, and the like; and to make due return of the process by him executed. *Ayl. Parerg.* 68.

[55]

More particularly, his conduct is regulated by the following canons and constitutions:

(1.) *Otho.* We do ordain, that from henceforth letters citatory, in causes ecclesiastical, shall not be sent by those who obtain them, nor by their messengers; but the judge shall send them by his own faithful messenger, at the moderate expence of the person suing them out; or at least the citation shall be directed

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(*o*) *Nihil interest neget quis, an taceat interrogatus, an obscure respondeat, ut incertum demittat interrogatorem. Dig.* 11. 1. 117.

(8) Mandamus lies to admit the archbishop's apparitor general. *Folkes's case*, cited *Stra.* 897.

to the dean of the deanry where the party to be cited dwelleth, who at the judge's commandment shall faithfully execute the same by himself or his certain and trusty messenger. *Athon.* 63.

To the dean of the deanry]. That is, the rural dean, who had then some office and jurisdiction.

(2.) *Boniface.* We being desirous to apply a remedy against those grievances and excesses, which the beadles or apparitors of archdeacons and deans occasion to our subjects, do ordain that when in order to execute their mandates, or to do other things necessary, they come to the houses of rectors, vicars, or curates, *or of other priests,* clerks or religious, they shall demand nothing of them by way of procuration or other duty; but accepting with thanks what shall be set before them, they shall be content therewith. And they shall not execute their precepts by messengers or sub-beadles, but in their own persons. And they shall not pass sentence of excommunication or interdict themselves, nor denounce such sentences passed by others, without special mandates from their principals: and if they shall presume to do otherwise, such sentences shall not bind. And the beadles or apparitors who shall act contrary to this constitution, and shall be found burdensome or injurious to the subjects of their masters, shall be severely punished, and be obliged to render double to those they have aggrieved. *Lind.* 221.

Or of other priests] As, chantry priests, or other who performed obits or anniversaries. *Id.*

(3.) *Stratford.* We do ordain, that every one of our suffragans shall have one riding apparitor only, for his diocese; and that the archdeacons of the several places within our province shall have one apparitor for every deanry, not riding but on foot: And they shall not stay with the rectors or vicars of churches at their charge more than one night and day in every quarter of a year, unless they be specially invited by them: And they shall not make any collections of money at the general chapters; nor of [56] wool, lambs, or other things at any other time; but they may accept with thanks what shall be freely given to them. And if any more shall be deputed than is above expressed, or any of them shall be found temerariously to act contrary to the premises; they who deputed them shall be suspended from their office and benefice, until they shall remove such person so deputed, and they who shall be so deputed shall be for ever *ipso facto* suspended from the office of apparitors. *Lindw.* 225.

(4.) *Can.* 138. Forasmuch as we are desirous to redress such abuses and aggrievances, as are said to grow by sumners or apparitors; we think it meet that the multitude of apparitors be (as much as is possible) abridged or restrained: wherefore we decree and ordain, that no bishop or archdeacon, or other their vicars or officials, or other inferior ordinaries, shall depute or have more

apparitors to serve in their jurisdictions respectively, than either they or their predecessors were accustomed to have thirty years before the publishing these our present constitutions. All which apparitors shall by themselves *faithfully execute their offices;* neither shall they under any colour or pretence whatsoever cause or suffer their mandates to be executed by any messengers or substitutes, unless upon some good cause to be first known and approved by the ordinary of the place. Moreover they shall not take upon them the *office of promoters or informers for the court.* Neither *shall they exact more fees than are in these our constitutions formerly prescribed.* And if either the number of the apparitors deputed shall exceed the assigned limitation, or any of the said apparitors shall offend in any of the premises; the persons deputing them, if they be bishops, shall upon admonition of their superior discharge the persons exceeding the number so limited; if inferior ordinaries, they shall be suspended from the execution of their office, until they have dismissed the apparitors by them so deputed; and the parties themselves so deputed, shall for ever be removed from the office of apparitors, and if being so removed they desist not from the exercise of their said offices, let them be punished by ecclesiastical censures as persons contumacious. Provided, that if upon experience the number of the said apparitors be too great in any diocese, in the judgment of the archbishop for the time being; they shall by him be so abridged, as he shall think meet and convenient.

[57] *Faithfully execute their offices*] If a monition be awarded to an apparitor, to summon a man, and he upon the return of the monition avers that he had summoned him, when in truth he had not, and the defendant be thereupon excommunicated; an action on the case at common law will lie against the apparitor for the falsehood committed by him in his office, besides the punishment inflicted on him by the ecclesiastical court for such breach of trust. *Ayl. Parerg.* 70. 2 *Bulst.* 264.

[Which kind of punishment of the apparitor for misbehaviour, is much more regular than that which was inflicted by the famous Bogo de Clare (mentioned elsewhere in this book, under the title **Plurality**); whose servants, when the apparitor went to serve a citation upon him in parliament time, compelled the apparitor to eat both the citation and the wax. *Ayl. Par.* 70, 71.]

Office of promoters or informers for the court] *H.* 8. *C. Carlion* and *Mill.* Action upon the case, for that the defendant being an apparitor under the bishop of Exeter, maliciously, and without colour or cause of suspicion of incontinency, of his own proper malice, procured the plaintiff *ex officio*, upon pretence of fame of incontinency with one Edith (whereas there was no such fame nor just cause of suspicion), to be cited to the con-

sistory court, and there to be at great charges and vexation until he was cleared by sentence; which was to his great discredit and cause of great expences and losses; for which the action is brought. Upon not guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment, that in this case an action lieth not; for he did nothing but as an informer, and by virtue of his office. But all the court held, forasmuch as it is alleged that he did maliciously and without colour of suspicion cause him to be cited, upon pretence of fame where there was no offence committed, and it is averred that there was not any such fame, and he is found guilty thereof, therefore the action well lieth. *Cro. Car.* 291. (*p*)

Neither shall they exact more fees than are in these our constitutions formerly prescribed] That is, in Can. 135, which is specified under the title Fees. (*q*)

Appeal. [58]

1. [APPEAL is the removal of a cause from an inferior court or judge, to a superior.] There were no appeals to the pope out of England, before the reign of king Stephen (9); when they were introduced by Henry de Blois, bishop of Winchester, the pope's legate. Not but attempts had been made before that time, to carry appeals to Rome, which were vigorously withstood by the nation; as appears by the complaint of the pope in the reign of Henry the first, that the king would suffer no appeals to be made to him; and before that, in the reign of William Rufus, the bishops and barons told Anselm (who was attempting it) that it was a thing unheard of for any one to go to Rome (that is, by way of appeal) without the king's leave. And though this point was yielded in the reign of king Stephen, yet his successor Henry the second resumed and maintained it, as appears by the constitutions of Clarendon, which provide for the course of appeals within the realm, so as that further process be not made, without the king's assent. (*r*) And

Origin of appeals to Rome.

(*p*) 1 *Roll. Ab.* 93.

(*q*) These fees, if withheld, may be recovered in an action at law, but cannot be libelled for in the Ecclesiastical Court. [*Pollard* v. *Gerrard, Ld. Raym.* 703. *Johnson* v. *Lee*, 5 *Mod. Rep.* 238. *Pearson* v. *Campion, Dougl. Rep.* 629.]

(9) 2 *Roll.* 233. *l.* 25. 35. *Circa* the 16th year of his reign, A.D. 1151.

(*r*) *Chap.* 8. The king's assent might be withheld, and the appeals prohibited, as we find by a writ in the Register, fo. 89, *de securitate inveniendâ quod se non divertat aliquis versus partes externas sine licentiâ regis.*

afterwards, in the parliament of Northampton, the constitutions of Clarendon were renewed; but in the reigns of Richard the first and king John, we find new complaints of the little regard paid to those appeals; for which also divers persons were imprisoned in the reigns of Edward the first, Edward the second, and Edward the third. *Gibs.* 83. 4 *Inst.* 341.

Nevertheless, appeals to Rome still obtained, until the reign of king Henry the eighth, when they were finally abolished by the statutes of the 24 *H.* 8. *c.* 12. and 25 *H.* 8. c. 19. (1) (here following).

Appeals to Rome abolished.

2. By 24 *H.* 8. *c.* 12. *ss.* 2. 4. All causes testamentary, causes of matrimony, and divorces, rights of tithes, oblations, and obventions, shall be finally determined within the king's jurisdiction and authority, and not elsewhere; any foreign appeals to the see of Rome, or to any other foreign courts or potentates, to the let or impediment thereof in any wise notwithstanding. And if any person shall procure from the see of Rome or any other foreign court any appeal in any the causes aforesaid, or [59] execute any process concerning the same, he shall incur a præmunire. (2)

By 25 *H.* 8. c. 19. *ss.* 3. 5. No manner of appeals shall be had out of this realm to the bishop or see of Rome, in any causes or matters whatsoever; but all manner of appeals, of what nature or condition soever they be, shall be made and had after such form and condition, as is limited for appeals in causes of matrimony, tithes, oblations, and obventions, by a statute made since the beginning of this parliament. And if any person shall sue any appeal to the bishop or see of Rome, or procure or execute any process from thence; he, his aiders, counsellors, and abettors, shall incur a *præmunire.* *ss.* 3. 5.

Appeals to the several courts respectively within this realm.

3. And *appeals within this realm shall be in this form*, and not otherwise; first, *from the archdeacon or his official*, if the matter or cause be there begun, *to the bishop*. 24 *H.* 8. *c.* 5. *s.* 12.

If it be *commenced before the bishop or his commissary; then *from the bishop or his commissary*, within fifteen days next ensuing the judgment or sentence given, *to the archbishop;* and there to be definitively and finally ordered, decreed, and adjudged, without any other appeal whatsoever. *s.* 6.

If the matter for any the causes aforesaid, be commenced before the archdeacon of any archbishop, or his commissary; then the party grieved may take his appeal, within 15 days next after judgment or sentence given, to the court of the arches, or audience of the same archbishop; and from the said court of

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(1) Repealed, 1 & 2 *Ph.* & *M.* c. 8. Revived, 1 *El.* c. 1.
(2) See 4 *Inst.* 339.

the arches, or audience, within fifteen days then next ensuing after judgment or sentence there given, to the archbishop of the same province, there to be finally determined without any other appeal. *s.* 7. (3)

If the matter be commenced for any the causes aforesaid, before the archbishop, then the same shall be before him definitively determined, without any other appeal, provocation, or any other foreign process out of this realm to be sued to the let or derogation of the said judgment, sentence, or decree, otherwise than is by this act limited; saving always the prerogative of the archbishop and church of Canterbury, in all the foresaid causes of appeals, to him and his successors, to be sued within this realm, in such and like wise as they have been accustomed and used to have heretofore. *s.* 8.

Appeals within this realm shall be in this form] Which is to be done by demanding letters missive, called *apostoli*, from the judge *a quo* to the judge *ad quem.* *Gibs.* 1035.

From the archdeacon or his official to the bishop] And not per saltum to the archbishop: and this is agreeable to the rule of the ancient canon law. *Gibs.* 1036. (*s*) [60]

In *Robinson* v. *Gonsalve, M.* 8 *W.* it was resolved by the court, that where an archdeacon has a *peculiar* jurisdiction, he is totally exempt from the power of the bishop, and the bishop

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(3) Admissibility of articles is not debateable in an appeal court, on an appeal entered more than 15 days after their admission by the court *a quo. Schultes* v. *Hodgson,* 1 *Add. Rep.* 105. See 24 *H.* 8. *c.* 12. *s.* 7. Ten days for appeal are assigned by the canon law, and *reformatio legum.*

Appeal from the bishop, or his commissary, to the archbishop "*in his court of arches*" is good; though this is not the proper court, for the words are superfluous. (*Dyer,* 240. *b.*) So it lies from the dean or commissary of the archbishop in his exempt jurisdiction to the court of arches or audience by the common law, for it is not within 24 *Hen.* 8. *c.* 12. *Oughton,* tit. 275. So *a delegato ad delegantem, viz.* from the commissary or official of a bishop to the bishop himself. *Id.* tit. 274.

(*s*) *X.* 2. 28. 66. The canon law however allowed an appeal to the pope, *omisso medio.* *C.* 2. *Q.* 6. *c.* 4, 5, 6. *et seq.* *X.* 2. 28. 7. And to his legates. *X.* 1. 30. 1. where both an appellate and an original jurisdiction are said to belong to the archbishop of Canterbury *legationis jure.* But this custom of appealing to the pope is said not to have obtained in France, where if the bishops in council doubted of the ecclesiastical law, the appeal lay to the metropolitan in council, and from him to the primate, whose decision was final. *C.* 6. *Q.* 4. c. 3. The rule of the civil law is, that appeals shall be made *gradatim,* and not *per saltum.* See *Huber ad Pand.* 49. 3. *Dig.* 49. 1. 21. And *Bockelman de Differentiis Jur. Civ. et Can. cap.* 79. *in notis.*

cannot enter there and hold court. And in such case if the party who lives in the peculiar be sued in the bishop's court, a prohibition shall be granted, for the statute intends that no suit shall be *per saltum.* But if the archdeacon has not a peculiar, then the bishop and he have concurrent jurisdiction, and the party may commence his suit either in the archdeacon's court, or the bishop's; and if he commence in the bishop's court, no prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there. *L. Raym.* 123.

From the bishop] This is to be extended to all who have episcopal jurisdiction: As in the case of *Johnson* and *Ley, M. 7. W.* where the dean of Salisbury, in one of his peculiars, made letters of request to the dean of the arches; it was objected, in order to obtain a prohibition, that this was *per saltum*, and that he ought to have made request to the bishop of Salisbury, his immediate ordinary: But the plea was not allowed, because this was not (as in the case of an archidiaconal peculiar) subject to the jurisdiction of the ordinary, but immediately to the archbishop. *Gibs.* 1035. *Skin.* 589.

From the bishop or his commissary, to the archbishop] And not from the bishop's official or commissary, to the bishop himself; for the reason given in the canon law, namely, lest (having both
[61] but one auditory) the appeal should seem to be made from the same person to the same person. *Gibs.* 1036. (*t*)

But by the 25 *H.* 8. *c.* 19. *For lack of justice in the archbishop's courts, the party grieved may appeal to the king in chancery;* and upon every such appeal, *a commission shall be directed under the great seal to such persons as shall be named by the king,* like as in case of appeal from the admiral's court, to hear and determine such appeals; *whose sentence shall be definitive:* and no further appeals to be had from the said commissioners. *s.* 4.

For lack of justice in the archbishop's courts] Such appeal lies not from a local visitor; nor in any cause of a temporal nature; nor did it lie from the high commission court when in being, because they themselves were the king's delegates, as acting by immediate commission from him, and there was no remedy against their sentences but a new commission to others grantable in virtue of the royal prerogative and independent of this statute. *Wats. c.* 6.

The party grieved may appeal to the king in chancery] And no commission of delegates, in any case of weight, shall be awarded, but upon petition preferred to the lord chancellor, who will name

(*t*) 6º 1. 4. 2. and 2. 15. 3.; and see *Cart* v. *Marsh, Stra.* 1080. *infra*, 373.

the commissioners himself, to the end they may be persons of convenient quality, having regard to the weight of the cause, and dignity of the court from which the appeal is. *Bacon's Tracts*, 294.

And sometimes for a supply of justice, on petition to the king, a special commission of delegacy issueth, to begin the suit, and proceed originally in the cause; as where the archbishop himself is interested, or the like. 1 *Oughton's Ordo Judiciorum*, 437.

A commission shall be directed under the great seal, to such persons as shall be named by the king] These commissioners are usually some of the lords spiritual and temporal or both, and commonly one or more of the twelve judges, and one or more doctors of the civil law. *Floy*, 20. (4)

And they are commonly called *delegates* (according to the language of the civil and canon law), on account of the special commission or delegation they receive from the king, for the hearing and determining every particular cause. Agreeably whereunto, their proceedings are according to the rules of the civil and ecclesiastical laws (5); and on that account it hath been particularly adjudged, that a suit there doth not abate by the death of the parties: This being the course in the ecclesiastical courts. Also prohibitions go to them, as to an ecclesiastical court. (6) But in the case of *Stephenson* and *Wood*, H. 10 Ja. (*u*), the better opinion of the court was, that they could not grant letters of administration. *Gibs*. 1037. [62]

Whose sentence shall be definitive] In the case of *Saul* and *Wilson*, *M*. 1689. By the lords commissioners: There lies no

(4) It is discretionary with the court of chancery to grant a *full* commission of delegates, (*i. e.*) to lords spiritual and temporal, judges at common law, and civilians, or to judges and civilians only: thus when the jurisdiction of bishops, or a question which concerns the canon or ecclesiastical law are in controversy, a full commission is granted: where it is a mere matter of law, as a question on a will, it issues to judges and civilians only. *Ex parte Hellier*, 3 *Atkyns*, 798. The king may appoint whom he pleases to be delegates, and when they are equally divided in opinion, may add others by a commission of adjuncts. 1 *Ld. Raym*. 475. 4 *Burr*. 2254. If any of the judges are in the commission, one of them usually appoints the place of assembly at Serjeant's inn. 1 *Ld. Raym*. 476. If the appeal is on a collateral point, the delegates may, instead of remitting the cause to the arches, retain it *ad instantium partis*, and hear it on the merits. *Williams* v. *Osborne*, *Stra*. 80.

(5) And they cannot fine or imprison. 4 *Inst*. 334. 13 *Car*. 2. *c*. 12. But *Comm. semb*. may excommunicate. *Acc*. 2 *Rol*. 233. *l*. 10. 2 *Bulstr*. 4. *cont*.

(6) *Rebow* v. *Bickerton*. *Bunb*. 81. 2 *Rol*. 24.

(*u*) 2 *Buls*. 2. [But see *Latch*. 85. 2 *Rol*. 233. *l*. 10. *Com. Dig*. tit. *Administration* (B. 2.)]

appeal from a sentence in a court of delegates; for they cannot have any original jurisdiction, because it is a matter grounded upon an act of parliament, and the act gives them none. 2 *Vern.* 118.

Commission of Review.

* But on a petition to the king in council, a commission of review may be granted under the great seal, appointing new judges, or adding more to the former judges, to revise, review, and rehear the cause. 1 *Ought.* 437. (7)

And hereupon lord Coke observeth, that albeit these statutes do upon certain appeals make the sentence definitive as to any appeal, and that no further appeal should be had; yet the king, after such a definitive sentence, as supreme head, may grant a commission of review, for two causes; 1. For that it is not restrained by the statute. 2. For that after a definitive sentence, the pope as supreme head by the canon law used to grant a commission *ad revidendum*; and such authority as the pope had, claiming as supreme head, doth of right belong to the crown, and is annexed thereunto by the statutes of the 26 *H.* 8. *c.* 1. and 1 *Eliz. c.* 1. (8) And so it was resolved in the king's bench, *T.* 39 *Eliz.* where the case was, that sentence being given in an ecclesiastical cause in the country, the party grieved appealed according to the act of the 24 *H.* 8. to the archbishop, before whom the first sentence was affirmed. Whereupon, according to the statute of the 25 *H.* 8. he appealed to the delegates: before whom both the former sentences were repealed and made void by definitive sentence. And thereupon the queen, as supreme head, granted a commission of review, *ad revidendum* the sentence of the delegates. And upon this matter, a prohibition was prayed in the king's bench, pretending that the commission of review was against law, for that the sentence before the delegates was definitive by the statute of the 25 *H.* 8. But upon mature deliberation and debate, the prohibition was denied: for that the commission for the causes abovesaid was resolved to [63] be lawfully granted. In this case Coke says, he being then the queen's attorney, was of counsel to maintain the queen's power. And precedents were cited in this court, in *Michelot*'s case. 29 *Eliz.* and in *Goodman*'s case, and in *Huet*'s case, in the same year. 4 *Inst.* 341.

But a commission of review is matter of discretion, [and favour] and not of right (9): and if it be a hard case, [as to bastardise

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(7) On appeal new matter must be brought; but in review the parties must proceed *ex eisdem* acts, unless there be a clause to admit new allegations and receive new matter, and to take proofs thereupon, as well on the one part as on the other. 1 *Oughton*, 437. *Popping*'s case, 2 *Eq. Ab.* 82. (*n*) to *pl.* 4. *Sel. Ch. Cu.* 48. The practical mode of obtaining it is shewn in 4 *Vesey*, 211. note.

(8) 1 *Inst.* 341.

(9) *Hill* v. *White*, *Mosely's Rep.* 30.

issue] the chancellor will advise the crown not to grant it. [*Moore*, 782. *Franklin*'s case.] 2 *P. Will.* 299. (1)

4. By stat. 24 *H.* 8. *c.* 12. *s.* 9. If any matter, *for any of the causes specified in the said statute*, shall come in contention in any of the aforesaid courts, which shall touch the king; the party grieved may appeal from any of the courts of this realm, to the spiritual prelates, and others abbots and priors of the upper house, assembled and convocate by the king's writ in the convocation being, or next ensuing *within the province or provinces where the same matter of contention is or shall be begun* (2); so that such appeal be within fifteen days after sentence given: and the same to be there finally determined. (3)

Appeal to the convocation; where the king is party.

5. By stat. 25 *H.* 8. *c.* 19. *s.* 6. Appeals from the governors of abbies or other places exempt, which, by reason of grants or liberties, were heretofore to the pope, shall now be to the king in chancery, and shall be definitively determined by authority of the king's commission: so that no archbishop or bishop shall intermit or meddle with such appeals, otherwise than they might have done before. (4)

Appeals from places exempt.

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(1) It may be had by one interested in a sentence, though not a party to the original suit. *Jones* v. *Bouqett*, 1 *Atkyns*, 298. In *Matthews* v. *Warner*, 4 *Ves.* 186. a commission of review was granted, on the ground that the points of law arising on the proceedings relating to a will were so important to the public, that it was fit they should be heard and determined in the most solemn manner. So it will be granted if the delegates have differed in opinion, or if the chancellor reports that the question involves a difficult point of law, and very valuable property. *Hyde* v. *Calamy*, 1752.; see other cases, *Annesley* v. *Palmer*, 9 *Mod.* 8. *Hill* v. *White*, supra; *Goodwin* v. *Giesler*, 4 *Ves.* 211. note, ex parte *Fearon*, 5 *Ves.* 633. But in a subsequent case it was refused, and the certificate of the lord chancellor stated, that a commission of review is not granted, unless there are very cogent reasons for believing, that the sentence is founded on error in fact or in law, or unless the doctrines of law, upon which it is supposed to be founded, are so questionable or important as to make it clearly fit, that they should be considered in the most solemn manner. *Eagleton* and *Coventry* v. *Kingston*, 8 *Ves.* 438; see also *Com. Dig.* tit. *Prerogative*, (D. 16.)

(2) Therefore in the province of York, the appeal lies now to the archbishop and his bishops: in the province of Canterbury before the archbishop and the other bishops. See 3 *Bla. Com.* by Christian, 67.—Note 1. But Sodor and Man is within the province of York, and makes the fourth bishopric therein. See 1 *Inst.* 94. and 1 *Blac.* 280. Note 24.

(3) 4 *Inst.* 339, 340.

(4) Therefore in *all ecclesiastical* causes appeal lies to the delegates, 4 *Inst.* 339.; but not on a sentence of deprivation by a visitor of a college, 4 *Inst.* 340. *Dyer*, 209. *a.* or by visitors constituted by special commission, 4 *Inst.* 340. 2 *Rol.* 232. *l.* 50. for these are tem-

Manner of obtaining a commission of delegates.

6. The manner of obtaining a commission of delegates is thus: The proctor of the appellant draws a petition to the lord chancellor or lord keeper, setting forth the cause, and what his client insisted on, and what the judge decreed; and that thereupon his client, thinking himself aggrieved, hath appealed from the said decree to the king's majesty in his high court of chancery: Wherefore his client humbly requesteth of the lord chancellor, that a commission of appeal be made out and issued under the great seal, directed to certain judges delegate to be named at his pleasure, to hear and determine the cause aforesaid. Whereupon the lord chancellor sets down the names of such persons as he thinks proper: and afterwards a commission is drawn and executed in due form, by virtue whereof the commissioners proceed to hear and determine the matter of the appeal. 1 *Ought.* 437.

In what case caution is to be required, before admission of the appeal.

*[64]

7. *Can.* 98. For as much as they who break the laws, cannot in reason claim any benefit or protection by the same; *we decree and appoint, that after any judge ecclesiastical hath proceeded judicially against obstinate and factious persons, and contemners of ceremonies, for not observing the rights and orders of the church of England, or for contempt of publick prayer; no judge ad quem, shall admit or allow any his or their appeals, unless he having first seen the original appeal, the party appellant do first personally promise and avow, that he will faithfully keep and observe all the rights and ceremonies of the church of England, as also the prescript form of common prayer, and do likewise subscribe to the three articles, concerning the king's supremacy, the book of common prayer, and the thirty-nine articles of religion.

Stamp duty.

8. [By 55 *Geo.* 3. *c.* 184. Schedule. Part the second, No. I, II. Every appeal from the court of arches, or the prerogative court of Canterbury or York, shall be upon a 15*l.* stamp.]

Suspension of the sentence during the appeal.

9. During the appeal, the sentence given by the inferior court or judge is suspended.

Thus, if a church be voidable by deprivation, and the ecclesiastical judge hath actually pronounced a sentence of deprivation against the incumbent; yet if the person deprived doth make his appeal, the church is not actually void, so long as the appeal dependeth: and if the sentence of deprivation upon the appeal be declared void, the clerk is perfect incumbent as before, without any new institution. *Wats. c.* 6. (5)

poral matters. Thus, also, an appeal from the dean and chapter of Exeter cites to the court of arches, and not to the consistory court of Exeter. *Parham* v. *Templar*, 3 *Phill. R.* 223. Court of appeal, on an appeal from a grievance, cannot enforce payment of costs incurred in the inferior court. *Brisco* v. *Brisco*, 3 *Phill. R.* 38.

(5) *Dy.* 240. B. 6 *Rep.* 18. *Attentat* is any thing soever wrongfully innovated or *attempted* in the suit by the judge, *a quo* pending

10. And pending the appeal, it is usual, at the instance of the appellant, for the superior court to grant an inhibition to stay the execution of the sentence in the inferior court until the appeal shall be determined, which by *Can.* 96. shall not be granted out of any court belonging to the archbishop, at the instance of any party, unless it be subscribed by an advocate practising in the said court. And the like course shall be used, in granting forth any inhibition at the instance of any party, by the bishop or his chancellor against the archdeacon, or any other person exercising ecclesiastical jurisdiction. And if in the court or consistory of any bishop there be no advocate; then shall the subscription of a proctor practising in the same court, be held sufficient. **Inhibition.**

And by *Can.* 97. it is further ordered and decreed, that henceforward no inhibition be granted by occasion of any interlocutory decree, or in any cause of correction, except under the form [65] aforesaid. And moreover, that before the going out of any such inhibition, the appeal itself, or a copy thereof (avouched by oath to be just and true), be exhibited to the judge or his lawful surrogate, whereby he may be lawfully informed, both of the quality of the crime, and of the cause of the grievance, before the granting forth of the said inhibition. And every appellant, or his lawful proctor, shall before the obtaining of any such inhibition, shew and exhibit to the judge or his surrogate in writing a true copy of those acts wherewith he complaineth himself to be aggrieved, and from which he appealeth; or shall take a corporal oath, that he hath performed his diligence and true endeavour for the obtaining of the same, and could not obtain it at the hands of the register in the country, or his deputy, tendering him his fee. And if any judge or register shall either procure or permit any inhibition to be sealed, so as is said, contrary to the form and limitation above specified; let him be suspended from the execution of his office, for the space of three months; and if any proctor, or other person whatsoever by his appointment, shall offend in any of the premises, either by making or sending out any inhibition, contrary to the tenor of the said premises; let him be removed from the exercise of his office, for the space of a whole year, without hope of release or restoring.

Appraisement. See Wills.

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an appeal; and steps taken by the judge *a quo* on the same court-day, after appeal entered, but before service of inhibition and subsequent even to such service, when defendant was not *founded* in the first appeal, are no *attentats*. *Chichester* v. *Donegal.* 1 *Add. Rep.* 22, 23. *Attentats* must be revoked by a separate civil or criminal proceeding against the judge *a quo*, and not by charging them accumulatively in a libel of appeal. See an instance of a criminal proceeding, 1 *Add. Rep.* 24. — Note (*a*), *Lake* v. *Fisher.*

Appropriation.

I. *Original of the appropriation of churches.*
II. *Endowment of vicarages upon appropriation.*
III. *Augmentation of vicarages.*
IV. *Vicarages how dissolved.*

I. *Original of the appropriation of churches.* (5)

FOR the first six or seven centuries, the *parochia* was the diocese or episcopal district, wherein the bishop and his [66] clergy lived together at the cathedral church; and whatever

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(5) Appropriations are an abuse which took their rise in the darker ages. The term *appropriation* was borrowed from the form of the grant "*in proprios usus*," and appears peculiar or principally confined to England. *Portland* (Duke) v. *Bingham*, 1 *Hagg. Rep.* 163.

The distinction between "appropriation" and "impropriation," which has prevailed in common use subsequently to the dissolution of religious houses, has been, that an interest of this kind, when in the hands of a spiritual person, is called by the former, and when in those of a layman, by the latter name: (as being *improperly* in his hands, *Spelm.* on Tithes, *c.* 29. *p.* 137.) See *infra*, tit. Impropriation, *Com. Dig.* tit. *Advowson*, (E) *Ayliffe*, 90. There appears, however, to be no real original distinction between the terms. Since the dissolution, they are used as synonimous in statutes 1 *El. c.* 9., 1 & 2 *Ph. & M. c.* 4., and 29 *Car.* 2. *c.* 8. Before that event (which occasioned the principal number of the grants of parsonages made at different times by the crown to laymen), *viz.* in a petition to parliament, *temp. H.* 8. the term is *impropried*, and in 10 *Hen.* 6. for further enforcing 15 *R.* 2. *c.* 6., and 4 *H.* 4. *c.* 12., which did not receive the royal assent, the terms are "benefices held in proper use." So also in 15 *R.* 2. *c.* 6. See also *Kennett's Impropr.* 131.

The statutes of dissolution of religious houses, 27 *H.* 8. *c.* 28., *viz. s.* 2., and 31 *H.* 8. *c.* 13. *viz. ss.* 18, 19., *Wright* v. *Gerrard* and another, *Jones's Rep.* 2., have directed, that impropriations shall be held by laymen *as they were held by the religious houses from which they were transferred.* A full consideration of the original nature of appropriations may therefore be convenient. *An appropriation*, according to *Blackstone* and *Plowden*, seems to be the annexing of a benefice to the proper and perpetual use of some spiritual corporation, either sole or aggregate, being the patron of the living, which is bound to provide for the service of the church, and thereby becomes perpetual incumbent. The whole appropriation being nothing else but an allowance for the spiritual patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church, (1 *Bla. Comm.* 384, 5., *Plowden*, 496—500.) When the appropriation is thus made, the appropriators and their successors must sue and be sued in all matters concerning the rights of the church, by the name of parsons, (*Hobart's Rep.* 307.) the religious

were the tithes and oblations of the faithful, they were all brought into a common fund, from whence a continual supply

house could not assign the appropriation to any other spiritual body. (*Seld. Tithes*, 97.) Grants of parsonages, &c. have been also made by the crown at different times, and particularly by *Hen.* 8., to laymen; and are confirmed by 31 *Hen.* 8. *c.* 13. *ss.* 18, 19. (*see above*); but no lay rector has cure of souls in fact or presumption of law, for the distinction taken in some books, that he may have it *habitualiter*, more properly applies to cases of another description, where there is a spiritual rector, but *sine curâ*, and an endowed spiritual vicar of the same church, who has the *cura animarum, actualiter*, while the other is said to possess it only *habitualiter*. (*Duke of Portland* v. *Bingham*, 1 *Hagg. Rep.* 162., in which *Britton* v. *Wade*, *Cro. Jac.* 518., and *Clarke* v. *Heath*, 1 *Mod.* 13. 1 *Sid.* 426. same case as *Clarke* v. *Prinne*, 2 *Keble*, 484. are cited.)

Lord Stowell in the above case, in *Haggard's Reports*, says, there were two sorts of appropriation, or rather appropriation was authorized to be made with different privileges in two forms, (X. 5. 33. 3.) the one *pleno jure sive utroque jure tam in spiritualibus quam in temporalibus*, where the interests in the benefice, both temporal and spiritual, were annexed to some religious house, and the other *non utroque jure*, though *pleno jure*, as it is described, *in temporalibus*, where temporal interests only were conveyed, such as the tithes or patronage of the benefice, but the cure of souls resided in an endowed perpetual vicar.

In the *first* species, when the union was *ad mensam*, the religious house had cure of souls, and all rights, and performed the duties of the church by its own members, or by stipendiary curates, *who were removeable at pleasure.* (See the passage cited from *Vicar's Plea*, p. 107., and see *Selden on Tithes*, *c.* 12., *Ayliffe's Parerg.* 86. *Lyndwode*, 157, 158. *Hostiensis*, *lib.* i. p. 296. *et seq. De Officiis Ordinarii.*) This is the root of the peculiar kind of appropriation without a vicarage endowed, which is the origin of stipendiary curacies, in which the impropriator is bound to provide divine service, but may do it by a curate, not instituted, but only licensed by the bishop, and might reckon himself under no obligation to present a vicar to the bishop for institution, but might provide for the service of the church as the monks did, by a licensed curate. Since that time, the statutes of dissolution having enacted, that benefices of every description should be held as they had been held by the dissolved religious houses, a grantee who has obtained what was before held *ad mensam pleno et utroque jure*, would have the complete incumbency as *intitulatus* and beneficiary. If such an impropriator should take orders, he might perform the offices of the church without institution, only taking the *oaths* imposed by later acts. (1 *Hagg.* 164.) It is a fundamental maxim of the Gallican church, that since the carnival of Constance, A.D. 1414., it has become a legitimate cause of revocation in that kingdom. In England, it was ordained by the constitution of Othobon, that all religious houses which possessed churches *in proprios usus*, should present vicars with competent endowment to the diocesan for institution within six months, and if

was had, for support of the bishop and his college of presbyters and deacons, and for the repair and ornaments of the church,

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they failed so to do, the bishop was empowered to fill up the vacancy. This proving insufficient against the power of the monks, the statutes 15 *R.* 2. *c.* 6., and 4 *H.* 4. *c.* 12. were passed, and require vicarages to be regularly endowed. Vicarages thus became benefices, with cure of souls, held by the vicar, by something extrinsic of the impropriator; and held by the monks *in proprietatem* in some sort as a lay fee, (*Gibs. Cod.* 719. *Mallet* v. *Trigg*, 1 *Vern.* 42.) nevertheless, after 15 *R.* 2. *c.* 6., the monks still obtained appropriations as annexed *to their tables* as before, under plea of poverty; and inability to support themselves, these *uniones ad mensam* for sustentation of the monks were always presumed in law to be *utroque jure*, and as it had been held that the canon *de supplenda negligentiâ*, (X. 1. 10. 2. *Clem. l. t.* 5. *Vicar's Plea*, 107.) which gave the right of presentation on lapse, did not apply to such appropriations, it was universally the rule that they were in perpetual plenarty.

In the *second* species, *viz.* in grants *cum pleno jure in temporalibus*, we have seen that temporal interests only were conveyed, such as the tithes or patronage of the benefice, but the cure of souls resided in an endowed perpetual vicar, instituted by the bishop. (See *Vicar's Plea*, 107.) Sometimes the patronage was reserved. (*Com. Dig.* tit. *Advowson*, (D 2.) But all appropriations now coming into lay hands, shall be intended to be made with all necessary circumstances. *Hunston* v. *Cocket*, *Cro. Jac.* 252. 517., and an appropriation may create a right of patronage, *Bishop of London* v. *Mercer's Company*, *Stra. Rep.* 925.

The *actores fabulæ*, as they were called by *Dyer*, in an appropriation, are the patron, king, and ordinary; for it was necessary that the patron should obtain the king's license in chancery, and the consent of the ordinary, as both king and ordinary had an interest in lapses, (which, after the act of appropriation, could not take place,) and were also considered proper guardians of the rights of the church. (*Plowden*, 497. *Grendon* v. *Bishop of Lincoln*, 8 *Rep.* 11.) If the benefice was full, the concurrence of the incumbent was necessary to give the appropriation immediate effect, (*Plowden*, 499. *b.* 1 *Rol.* 239. (D.) See *Com. Dig.* tit. *Advowson*, (D 3) as to the persons by whom, and deed by which appropriation may be made, and *tit.* Ecclesiastical Persons, (C. 11.) as to creating a vicarage.

Rectories, tithes, &c. impropriate, come to the hands of lay persons, are lawful inheritances, (*Co. Lit.* 159. *a. Jones*, 3.) Every real action lies for them; and fines, recoveries, &c. may be made and suffered of them, 32 *Hen.* 8. *c.* 7., and see *Com. Dig.* tit. *Dismes*, (M. 2. 18. N.) So an ejectment lies, *Priest* v. *Wood*, *Cro. Car.* 301. So an indictment for forcible entry, or detainer, *Anonymous*, *Cro. Car.* 201.) So debt lies for treble value on subtraction of tithes, 2 *Inst.* 612. Impropriator may sue in ecclesiastical court, 32 *H.* 8. *c.* 7. *s.* 2.

and for other suitable works of piety and charity. So that before the distribution of England into parishes (as the word is now used) all tithes, offerings, and ecclesiastical profits whatsoever, did entirely belong to the bishop and his clergy for pious uses, and by their original nature could not be in the hands of any layman, or be employed to any secular purpose. This community and collegiate life of the bishop and his clergy, appears to have been the practice of our British, and was again appointed for the model of our Saxon churches.

While the bishops thus lived amongst their clergy, residing with them, in their proper seats or cathedral churches; the stated services, or publick offices of religion, were performed only in those single choirs; to which the people of each whole diocese resorted, especially at the more solemn times and seasons of devotion. But to supply the inconveniences of distant and difficult access, the bishop sent out some presbyters into the remoter parts, to be itinerant preachers, or occasional dispensers of the word and sacraments. Most of these mis- [67] sionaries returned from their holy circuit to the centre of unity, the episcopal college, and had there only their fixed abode; giving the bishop a due account of their labours and successes in their respective progress. Yet some few of the travelling clergy, where they saw a place more populous, and a people

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Blackstone declares, (1 *Comm.* 386.) that appropriations may be made at this day; but this is questioned by Mr. Christian, who says, "It cannot be supposed that at this day the inhabitants of a parish who had been accustomed to pay their tithes to their officiating minister, could be compelled to transfer them to an ecclesiastical corporation, to which they might be perfect strangers;" and "that there probably have been no new appropriations since the dissolution of monasteries." *Id.* note 21.

The appropriation may be severed, and the church become disappropriate in two ways; first, if the patron or appropriator presents a clerk, who is instituted and inducted to the parsonage; for the incumbent so instituted and inducted is, to all intents and purposes, complete parson, and the appropriation being once severed, can never be reunited again, unless by repetition of the same solemnities; (*Co. Lit.* 46. *Watson, Cl. L. c.* 17.) and the church being once presented to, becomes presentable for ever. *Plowden,* 501. 1 *Rol.* 240. *l.* 20. 50. So the advowson, &c. will be disappropriated, if the body which has the appropriation is dissolved, because the perpetuity of person is gone, which is necessary to support the latter. (*Plowd.* 501. *a. Jones,* 3.) So if the advowson be recovered in a writ of right, (1 *Roll.* 240. *l.* 40.) but presentation by usurpation, with institution and induction thereon, does not disappropriate, (*Plowd.* 501. *a.*) nor grant of advowson by the king, when he has a rectory appropriate, 3 *Leon,* 101. Nor by the abbot and convent to which it was appropriated. *Saville,* 30. *Dub.* See *Com. Dig.* tit. *Advowson,* (D 4.) As to an appropriation creating a sinecure rectory. See SINECURE.

zealous, built there a plain and humble conveniency for divine worship; and procured the bishop to consecrate it for an *oratory* or chapel at large, not yet for a parish church, or any particular congregation, to be confined within certain bounds and limits. And while the necessities of the country were thus upon occasion supplied, it did not alter the state of the ecclesiastical patrimony; which still remained invested in the bishop for the common uses of religion, as devoted solely to God and his clergy.

The division of a diocese into rural parishes, and the foundation of churches adequate to them, cannot be ascribed to any one act, nor indeed to any one single age.

Several causes and persons did contribute to the rise of parochial churches. (6) Sometimes the itinerant preachers found encouragement to settle amongst a liberal people, and (by their assistance) to raise up a church, and a little adjoining manse. Sometimes the kings, in their country vills and seats of pleasure or retirement, ordered a place of worship for their court and retinue, which was the original of royal *free chapels*. Very often the bishops, commiserating the ignorance of the country people, took care for building churches, as the only way of planting or keeping up christianity amongst them. But the more ordinary and standing method of augmenting the number of churches, depended on the piety of the thanes or greater lords; who having large fees and territories in the country, founded churches for the service of their families and tenants within their dominion. It was this gave a primary title to the patronage of laymen: it was this made the bounds of a parish commensurate to the extent of a manor: it was this divided the several portions of the same church, according to the separate interests of the several lords: and it was this distinct property of lords and tenants, that by degrees allotted new parochial bounds, by the adding of new auxiliary churches.

This first designation of parish churches did not at all break in upon the right of the bishop, either in respect of spirituals or
[68] temporals. For the bishop had still the proper cure of souls within his whole diocese, and a title to all the ecclesiastical

(6) As to the origin of parishes, see *infra*, Parish. Selden says, that about A.D. 700., the Saxons, in large districts, founded churches for themselves and their tenants, which was the original of parish churches. *Selden on Tithes*, 259. *c.* 9. *s.* 4. Within these districts other churches were afterwards erected, which, in process of time, have obtained tithes, burial, and baptism, and thereby become parish churches; (*Id.* 262. *c.* 9. *s.* 4. *Defence of Pluralities*, 92.) and therefore, every church having burial and *sacramentalia*, (2 *Inst.* 363.) or burial, baptism, and tithes, is now esteemed a parish church. *Seld. on Tithes*, 265. *c.* 9. *s.* 4.

revenues; and it was by his authority and consent, that parish churches and priests were so ordained, as helps and assistants given to him. For their number not only promoted the services of religion, but even advanced the revenues of the see. Yet for fear the bishop's committing so many parts of his charge to subordinate curates might seem a sort of recess from his right and claim to them, he had the most solemn reservations made to him and his successors. No church, however built, was to be employed for public service, till consecrated by the bishop. And no priest was to reside and officiate there, but by the bishop's delegation. And there were indeed as many acknowledgments of right and respect paid to the head of the diocese, as were by feudal customs paid to the head of the seigniory or civil dominion. For as the lord's own seat was the head of the barony, or the lord's court, whither the inferior tenants were summoned to answer for the conditions of their tenure; so the bishop's chair was always the seat and heart of the diocese, to which the clergy were cited to give account of their offices and possessions, as in their mother church. As each inferior tenant was admitted with some oath of fidelity to the prime lord; so every parish priest had admission to his church, with a like obligation of obedience to his bishop. As each tenant paid some sort of rent unto his lord, for being quieted in his possession; so the presbyter made a return of some part of the parochial profits to his bishop, for the security of enjoying the remainder to his own use. As no one tenant could desert his holding, or substitute another in it, without consent and acceptance of the lord; so neither could any parish priest forsake his charge, or appoint another to succeed him in it, without express leave and authority of the bishop. And as upon the death of a feudatory tenant, the custody of the lands came back to the lord, till an able heir should be instated in it; so likewise the custody of all vacant benefices did revert to the bishop, and he received the mean profits of them, till a successor was confirmed and settled in them. And in many other forms and customs of dependency and subjection, the parochial clergy were as accountable to the bishop, as the lay tenants were to the prime lord. So that during all this first constitution of parishes, there was nothing of tithe or glebe or oblations diverted into lay hands, or applied to any secular purposes; but the absolute property, and the intire disposal of them, did remain in the bishops and the clergy, for their own support, [69]
and other pious uses.

The first way of diverting the tithes and oblations from the immediate uses of the bishop and his clergy, did arise from the confusion of parochial bounds; which having no other limits set to them than those of the possessions of the respective founders, this obliged them and their retinue and tenants to pay

their duties to that one church: but if any new fee were erected within such lordship, or there were any people within the precinct who were independent on the patron, they were at liberty to choose any neighbouring church or any religious house, and to pay their tithes and make their offerings, wherever they received the benefits of religion. So the bishop receding from this former claim, and his substituted clergy not yet knowing the bounds of their respective cures; this let in an opinion, that tithes and oblations were an arbitrary disposition of the donor, who might give them as the reward of religious service done to him, in what place, or from what person soever he received that service. Which notion gave occasion to the monasteries, to ingross all the neighbouring people, and especially the richer lords and patrons, to themselves; and to draw them from their own priests to communicate in their cells: and so to bring their tithes and offerings with them. But yet this discretionary allotment of tithes and offerings, though injurious to particular priests and parish churches, was no violation of the general rights of the national church and clergy; for though the people so chose their own way of distribution, they did by no means detain the stated dues unto themselves, nor alienate them to any ordinary uses: they ever looked upon them as consecrated to the altar, and offered them purely for the sake of God and their souls.

A second prejudice to the parochial clergy was, the early division of tithes and offerings into several parts, for the several purposes of piety and charity. The benevolence of a diocese was at first entirely at the bishop's receipt and disposal; but that there might appear to be a just application of it, a rule obtained for dividing the fund into four parts: one to the fabrick and ornaments of the church; another to the officiating priest; a third to the poor, and necessitous travellers; and a fourth reserved to the more immediate service of the bishop and his college. But when fees began to be endowed with lands and other firm pos-
[70] sessions; then the bishops (to encourage the foundation of churches, and to establish a better provision for the residing clergy) did tacitly recede from their quarter part, and were afterwards by canons forbidden to demand it, if they could live without it. So as the division was now only into three parts; and every priest was the receiver and distributer as the bishop had been before, standing obliged to expend one part on the raising, supporting, and adorning his church and manse, another part upon entertaining strangers and relieving the poor, and to have a third reserved for his own immediate occasions. Yet still the whole product of tithes and offerings was the bank of each parish church, and the minister was the sole trustee and dispenser of them, according to those stated rules of piety and charity. But this tripartite division soon occasioned great disorders; for the

lay patrons did from hence infer, that a third part of the revenues of a church was sufficient for the supply of it, and they undertook to dispose of the two remaining parts; at first pretending to apply them to the like pious uses; but then by degrees detaining them in their own hands, and even at last getting them infeoffed in them and their heirs, especially within their own demesnes. And this proceeded so far, that in some parts the powerful patrons seized upon the whole prædial tithes, and left the altarage or smaller tithes (which were at first voluntary oblations, and therefore reckoned a part of the altarage) to the portion of the parish priest; setting a precedent of impropriations in lay hands, even before the religious fell into that method. But however, as the lay patrons at first took the tithes (or seldom more than two parts of them) in trust for the church and poor, not in tenure to their own property and pleasure; and after they were infeoffed in them, they still considered them to be charged with the same burdens; and while they held them, did exonerate the clergy from those burdens; so they would not keep that conditional tithe, but by degrees made a conscience to restore every part either to the parish churches, or at least to religious houses. So that long before the reformation, all manner of tithes and oblations were entirely given back to the church, and invested only in the clergy secular or regular.

The next injury to parochial churches came from the surrendering of the right of patronage to collegiate bodies. For the lay patrons remembering, that the clergy living in common with their bishop in his cathedral church, were formerly maintained by the tithes and oblations of the country; when this practice ceased, they thought it a sort of laudable restitution, to give the [71]
perpetual advowson of their churches to that body, or to some one particular member of it; whereby those churches became prebendal; and the supply of them was left to the community, or to that single canon who was to have his prebend or exhibition from it. All the monasteries found this method to be a very good expedient for them. Hence they incited their benefactors to confer upon their houses the right of presentation to country churches; a favour the more easily obtained, because the lay lords looked upon themselves as guardians only, and were glad to devolve their trust upon those societies; who, as they thought, would faithfully discharge it. And by these means, in an age or two, above one half of the parochial churches in England came to be lodged in the power of cathedrals and monasteries, and were personally served by the members of those bodies. But this by degrees let in mischief and usurpation; for the cathedral canons, finding their residence in those rural churches to be inconsistent with their due attendance in the chapter and choir, began to place annual curates to represent them in their

several benefices, to account for the profits of them, and to receive a small portion, or some pecuniary stipend for their service. Till, being pressed by the bishops, and obliged by some new constitutions, they did at last present their clerk to the full title of the church, reserving a rent or pension to themselves; which though at first moderate, they often advanced to the great oppression of the country clergy. The religious did the same in the monasteries, and had a fair pretence for so doing; for being tied to stricter rules of their order, and more confined within their cells, they appointed priests, whom they called secular, to take upon them the cure of souls, and to be stewards of the revenue, or at least pensioners to their several convents. And even some of the potent lay patrons followed this example, binding the clerks in the like annual rents and reservations to them and their heirs. So that within a hundred years after the conquest, most of the parish priests in England were become tributary to their patrons, and paid out such large pensions to them, that they were not able to subsist with decency and credit. This abuse becoming very grievous, occasioned divers constitutions to be made against it. But the lay patrons protected themselves by prohibitions and appeals from the ecclesiastical jurisdiction, and sued their clerks in the temporal court for the
[72] performance of such indirect covenants. Therefore the bishops did at last obtain from king Edward the second, a full and sole power to judge in this cause of pensions, and thereby did soon effectually suppress them as to lay patrons; and though the dignitaries and the religious did longer enjoy those pensions, yet were they often mitigated and restrained by the bishop, having been frequently complained of and even condemned by a decree of pope Clement the third. And it was indeed the restraint of these arbitrary prestations, that put the monks upon inventing the new stratagem of impropriations.

For when the monks saw that they could not well supply their own churches, and could no longer set arbitrary fines and pensions upon the poor clergy who supplied them; they fell upon the project of retaining the churches in their gift, and all the profits of them *in proprios usus*, to their own immediate benefit. This art of *appropriation* was certainly invented by monastick men, for a curb and weight upon the secular clergy; but in what year it began doth not certainly appear: for indeed all corruptions have a secret rise, and are not in history observed, till the scandal and the complaints do make some noise. It is said, that there were some appropriations of churches before the conquest; but these seem to have been only conveyances of the churches with their tithes to those religious corporations, who had thereby no other right conveyed to them, than what the lay lords had before; which was, a right of protection and com-

mendation to the church, not a right of converting the profits to their own use and property.

But the way of strictly appropriating parish churches to religious houses, of giving them in full right to the monks' absolute property and use, was an engine of oppression which came in with the Norman conquest; when the greater prelates being Normans, did trample upon the inferior clergy who were generally English; increased the pensions which the clergy were to pay unto them, or else withdrew their stipends; and yet loaded them with new services, and every way oppressed them without mercy. And to complete the servile dependance, an artifice was contrived, to obtain indulgence from the pope, that whatever churches they held in advowson, they should commit them to be served by clerks, who as to the cure of souls should be responsible to the bishop, but as to the profit should be accountable to the abbot or prior and his brethren.

And this was indeed effectual appropriation; a badge of slavery unknown to the Saxon churches, brought over by the Norman lords, and imperiously put upon the English clergy by [73]
the authority of the pope. And so this practice, which crept in with William the conqueror, in a few reigns became the custom of the land, and the infection spread, until within the space of 300 years, above a third part, and those generally the richest benefices in England, became appropriated.

And in these cures, the monks themselves did for some time reside and officiate by turns, by lot, and even by penance, with many other ways of shifting off the duty upon one another. Until at length such changes and intermissions in the pastoral care becoming very scandalous, the bishops did by degrees restrain the monks from a personal cure of souls, and confined them according to rule within their own cloisters; obliging them to retain fit and able *cappellans*, *vicars*, or *curates*, (for those titles did all mean the same office); with a competent salary paid to them. But then again they oppressed these stipendiary vicars with such sorry allowance, and such grievous service; that the bishops at last brought them to the presentation of perpetual vicars endowed and instituted, who should have no other dependance on their convents than the rectors had upon their patrons; declaring it to be dishonest and contrary to canon, that religious men, to whom it was granted to convert churches to their proper uses, should personally serve those churches, and therefore ordaining, that they should appoint perpetual vicars to be instituted by the bishop, with a competent maintenance by the bishop taxed and assigned to them.

One pretext of the religious to gain appropriations was, to desire no more than two parts* of the tithe and profits to be so appropriated to them; leaving a third to the free and quiet

enjoyment of the parish priest, whom at the same time they eased from the burden of repairing the church and relieving the poor; and took that charge upon themselves. Which third part, together with the altarage (or portion of oblations and perquisites and small tithes in a manner arbitrary) which also was commonly reserved to the vicar, made his portion often equal to, if not exceeding that of the convent. But the religious were not long content with their said two parts, without ingrossing the whole; which they generally did by donation, by purchase, by exchange, and all the ways of acquisition. So that in two or three following ages, parochial churches would have been universally annexed and united to religious houses, if the bishops
[74] had not provided for the ordination of perpetual vicarages, and the distinct endowment of them.

Another pretext of the religious for obtaining appropriations was, the consideration of hospitality and charity, which were entailed as it were upon their two parts of tithes and offerings. They chiefly urged these occasions, and promised to employ the profits this way. In the charters of donation, they got it alleged, to be for keeping up the hospitality of the said religious house, to find meat and drink to all that passed by their gates and would call for refreshment, and for the entertainment of all travellers and passengers (7); for sustaining the poor; for the almonry; for the infirmary; and for the provisions of their house; and even for many other uses, as to maintain scribes and illuminators to write and adorn their books; to bear the charges of holding a general chapter of their order; to defray the expences of a journey to Rome; to ease themselves in the payment of pensions; to rebuild the fabrick of their conventual church; and indeed to answer all other occasions that could be served by money.

The *seculars* learned this way of gain from the monks; and thought it as lawful and proper for any of the collegiate bodies, as it was for the regular convents. And therefore they likewise got the churches of their own donation to be converted to their own proper uses; and persuaded the neighbouring patrons to come and offer up advowsons on their high altar; to increase the number of their prebends, or to augment the portion of the dean, or of any other principal dignitary; or to repair their fabrick; or to find lights on their altars; or for the table of the bishop; or indeed for any thing that could contribute to the grandeur of the cathedral church or see. Not that all the churches which are now appropriated to bishops, or deans and chapters, were the effect of those superstitions: for many of them have been since given in a sad exchange for manors and firm lands.

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(7) See pages 65. and 77. *in notis*.

This ill example of appropriating parish churches spread further to *all bodies corporate*, however in law and reason incapable of such a tenure. Soliciting and paying the price at Rome procured the like favour for secular colleges, for chantries, nay for military orders, for lay hospitals, for gilds and fraternities, and even for nunneries. So making knights, lay-brothers, and very women, to be the rectors of parish churches. Though this indeed was grounded on a conceit, that all these were religious societies, and might receive and distribute out of the common treasury of the church. For before king Henry the eighth, there was no right or precedent for a mere lay person to be an [75] impropriator.

From corporations aggregate of many, this example went on to *single persons*; not only to deans, chantors, treasurers, chancellors, and separate officers, but at last to the parish priests themselves, who in populous or rich places obtained a vicar to be endowed, and casting upon him the cure of souls, they had the rectory appropriated to them and their successors as a *sine-cure* for ever. See **Sinecure.**

But, above all, the monks had their various arts of driving on this trade in holy things. The *bishop* of the diocese was often their friend and assistant in it, because he had been perhaps of the same order; or was disposed to keep up an interest in so great a body of men; or if they had no other tie upon him, they settled a pension to indemnify his see, or advanced the payment of synodals, or offered some other consideration of interest: and if at the last the bishop would not consent, they could apply to the papal legates, or directly to the court of Rome, where they never failed to have their presents accepted; and sometimes charged themselves with an annual pension to the cardinals, or even to the apostolic chamber for ever. They dealt as subtilly with the *patrons*, to extort their consent: they promised them the prayers and suffrages of their house, with masses, obits, anniversaries, pietances and other commemorations. And because, after all, by the laws of the land they could not appropriate without consent of the *rector* incumbent; therefore they sometimes prevailed with him to assume their order, and so to bring the church along with him; or they gave him a pension or a corody for his life, on condition of resigning; or if he would not comply, then they obtained leave of the patron to appropriate in reversion; or, to save the pains of working on the patron, they purchased the perpetual advowson, on purpose to appropriate the benefice.

If the smaller tithes and oblations (the common allotment to a vicar) would not amount to a third share; then some part of the greater tithe of corn and hay was allowed to make up such deficiency; which was the just cause of many vicarages being so endowed.

The ancient state of vicarages was the more tolerable, because there was not only a considerable portion for the vicar, but there was a power lodged in the bishop to augment that portion, whenever it appeared to be insufficient. This was the known right, [76] and the constant practice of the English bishops. Indeed the greater monasteries did oftentimes by exemptions and appeals to the court of Rome evade and deny this power of the diocesan: in order to obviate which refuge, the bishop in his instrument of consenting to appropriation, began to express the positive condition of saving a competent portion for a vicar, to be taxed and ordered by him in due consideration to hospitality and other burdens: and afterwards to be moderated and augmented as should seem to the ordinary fit and proper. But whether this power was explicitly reserved or not, it was thought an antecedent right, which the bishop might claim from the original constitution of the church. And even the common law did allow and enforce this practice: the year books affirming, that the ordinary may increase or diminish the vicar's portion. And for any thing which appears upon record; though this episcopal right was too often evaded by resort to the court of Rome; yet it was never questioned in any of our ecclesiastical or civil courts before the reformation. *Kennet* on Impropriations.

And so much concerning the original appropriation of churches: We come next to consider more particularly the endowment of vicarages consequent thereupon.

II. *Endowment of vicarages upon appropriation.* (8)

Restrictions by statute.

1. By statute 15 *R.* 2. *c.* 6. In every licence to be made in the chancery, of the appropriation of any parish church, it shall be expressly contained, that the diocesan of the place, upon the appropriation of such churches, shall ordain, according to the value of such churches, a convenient sum of money to be paid and distributed yearly of the fruits and profits of the same churches, by those that will have the said churches in proper use, and by their successors, to the poor parishioners of the said churches, in aid of their living and sustenance for ever; and also that the vicar be well and sufficiently endowed.

And by statute 4 *H.* 4. *c.* 12. *From henceforth, in every church appropriated, there shall be a secular person ordained vicar per-*

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(8) If there be no endowment of a vicarage, the impropriator of the small tithes is bound to maintain a priest, in which case a court of equity, on information by the attorney-general, may assign to the curate such a proportion of the small tithes as he thinks fit, but this is otherwise when there is an endowment, though never so small. *Bonsey* v. *Lee*, 1 *Vern. Rep.* 247.

petual, canonically instituted and inducted (z), and *convenably endowed* by *the discretion of the ordinary*, to do divine service, and to inform the people, and to keep hospitality there: and *no religious shall in any wise be made vicar in any church appropriated.*

From henceforth] This statute extendeth not to appropriations made before this time. *Cro. Jac.* 517. 2 *Rol. Rep.* 99. 127. *Palmer*, 222.

There shall be a secular person ordained vicar perpetual] In the case of *Bonsey* and *Lee*, *T.* 1684; it was decreed, that where there is no vicarage endowed, the impropriator of the small tithes is bound to maintain a priest; and upon an information by the attorney-general for that purpose, the king may assign to the curate such an allowance or proportion of the small tithes as he shall think fit: but otherwise it is, where the vicar is endowed, though but of never so small a matter. 1 *Vern.* 247. (*a*) [77]

Convenably endowed] So as without endowment, the appropriation [made after this statute] was not good. 12 *Co.* 4. 2 *Rol.* 99.

(*z*) Institution and induction seem to be the specific difference between a vicar and a perpetual curate: both can only be in a church that was appropriated. But this must be understood, only where the curacy is parochial: for, as to curates of chapels, there seems to be no similitude between them and curates of parishes. But yet it seems this cannot be so: for then *quære* what is the difference between a donative vicarage and a perpetual curacy? for it is commonly said that vicarages may be donative, and even rectories may be so. (*Vide post*, vol. ii. title Donative.) And yet it is contrary to this act that any vicarage, created on an appropriation since the act, should be donative: and therefore donative vicarages must have been such as were made on appropriations before the act, or upon appropriations *ad mensam monachorum*, which are not within the act; and these last, if any such there were, seem to differ only in name from perpetual curacies. A vicar is in for life; a curate, as it seems, at will. *Price* v. *Pratt and another*, *Bunb.* 273. The former is always (*qu.* or at least usually) endowed, the latter never. S.C. *Bunb.* 273. except since Queen Ann's bounty. (*Vide stat.* 1 *G.* 1. *st.* 2. *c.* 10.) N.B. A donative is always endowed, but a perpetual curacy is never, as it seems. *Bunb.* 273. And if so, then the endowment is a specific difference between a donative vicarage and a perpetual curacy. *Note* also, where there is a curate, the parson is incumbent; where there is a vicar, the vicar is incumbent. *Serjt. Hill's MS. Notes.*

(*a*) In appropriated churches, where no vicar has been endowed, the officiating minister is appointed by the appropriator or impropriator, and is called perpetual curate. *Note to Blackstone's Comm.* vol. i. p. 387. *Ed. Chr.*; and see p. 394.

By the discretion of the ordinary]. Before this, it could not be done but with the consent of the *patron*; but there was no necessity of the licence of the *king* (as in the case of appropriation), because no damage accrued to the crown. 2 *Roll's Abr.* 334.

No religious shall in any wise be made vicar in any church appropriated (*b*)] But if the benefice was given *ad mensam*
[78] *monachorum* (*c*), and so not appropriated in the common form, but granted by way of union *pleno jure* [*sine utroque jure tam in spiritualibus quam in temporalibus*, see 65. note 1.]; in that case, it was served by a monk of their own body, who was removable at their own pleasure. Which is the foundation of *stipendiary curacies*, where the impropriators are bound to provide divine service, but may do it by a curate, not instituted, but only licensed by the bishop. So the monks served them; and because the acts of dissolution gave the lands to the king *in such manner and form* as the monks held them, they who derive from the crown have reckoned themselves under no restraint to present a vicar to the bishop for institution. But though the canon law is clear that such benefices as were united *mensæ monachorum* might be served by *monks* (*d*), without institution; yet the law also was, that in case such cures were supplied by *seculars*, they

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(*b*) Monks, from the nature of their professional vow, were particularly ill calculated for the service of the church, as I have shewn in the note to title *Monasteries*; and though in later times they were allowed to be ordained by the bishop of the diocese, and were frequently advanced to the highest offices in the church, they were held to be incapable of a cure of souls without dispensation. *Lindwood*, 306. But having succeeded in procuring a vast number of benefices to be appropriated to their religious houses, they were frequently not content with naming clerks to serve them, who were to be ordained, instituted, and governed by the bishop, but thought fit to serve the churches themselves, and often pretended that the government of the bishop was incompatible with the regulations of their orders. These usurpations rendered them unpopular both with the laity and clergy. See *X.* 3. 37. 1. *Clem.* 1. 5. and *Ayliffe's Par.* 371. In the canon law, we find several regulations to secure a fit allowance to the clerks who serve appropriated churches, which allowance might be made a condition of their ordination, and if then neglected, might afterwards be assigned by the bishop. *Clem.* 3. 14. 1. A better, though in order of time a later remedy, was applied here by stat. 15 *R.* 2. which, as Dr. Gibson observes, makes a sufficient endowment a condition not of admitting the clerk, but of appropriating the benefice. *Gib. Cod.* 716. This act passed at the earnest complaint of the commons against the abuses of appropriations. *Rot. Par.* 15 *R.* 2. 38.

(*c*) *Vide infra*, vol. ii. p. 55.

(*d*) As to nunneries, that was not so. *Dugd. Warw.* 750—752.

must have institution; and there being now no supply but by seculars, it seems to follow, that by law no benefices can be now served by stipendiary curates, without institution: but the received practice is otherwise. Gibs. 717. 6 Mod. 230.

2. The act of endowment by the bishop might be made, either in the act of appropriation, or by a subsequent act and a separate instrument. Which is mentioned in this place, that in searching for endowments in the registries of bishops, or the court of augmentations, neither the one nor the other should be neglected; for although a separate act or instrument of endowment may not be found, yet it is possible the endowment may have been made in the act of appropriation. *Gibs.* 719. Act of endowment. (9)

If the body corporate be now in being to which the church is appropriated, as all the old cathedrals are; or if the impropriation were, at the dissolution of the monastery, given to any cathedral or collegiate church that now is; the most probable place to find the endowment of it is in the archives of that church: if not, perhaps it may be found in the augmentation office. But it is to be feared, that most of the endowments are now lost, at least to us, by being carried to Rome at the dissolution of monasteries. *Johns.* 239.

3. Upon the making an appropriation, an annual pension was reserved to the bishop and his successors, commonly called an *indemnity*, and payable by the body to whom the appropriation was* made. The ground of which reservation, in an ancient appropriation in the registry of the archbishop of Canterbury, is expressed to be, for a recompence of the profits which the bishop would otherwise have received during the vacation of such churches. *Gibs.* 710. Pension reserved in the act of endowment. *[79]

4. A vicarage by endowment becomes a benefice distinct from the parsonage. (1) As the vicar is endowed with separate revenues, and is now enabled by the law to recover his temporal Vicarage, a distinct benefice

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(9) When the vicar is *endowed*, and comes in by institution and induction, he hath *curam animarum actualiter* as is not removable at pleasure of the rector, who in this case hath only *curam animarum habitualiter* and concurrent with the vicar, *Heath* v. *Pryn*, 1 *Ventr.* 15; but where the vicar is not endowed, nor comes in by institution and induction, the rector hath *curam animarum actualiter*, and may remove the vicar at pleasure: and where a vicar is *endowed*, it is always out of the *rectory*, and by the act of the ordinary. *Smith* v. *Waller*, 3 *Salk.* 378. 1 *Lord Raym.* 587. S.C. See *infra*, 82. note (1).

(1) By 57 *Geo.* 3. *c.* 99. *s.* 81., no parsonage that hath a vicar endowed, or a perpetual curate, and without cure of souls, shall be deemed a benefice within this act; and by *s.* 94., after 10th *July*, 1817, no oath shall be required to be taken by any vicar in relation to residence on hisvicarage.

rights (2) without aid of parson or patron; so hath he the whole cure of souls (3) transferred to him by institution from the bishop. It is true, in some places, both the parson and the vicar do receive institution from the bishop to the same church (4), as it is in the case of *sinecures*; the original of which was thus: The rector (with proper consent) had a power to entitle a vicar in his church, to officiate under him; and this was often done; and by this means two persons were instituted to the same church, and both to the cure of souls, and both did actually officiate. So that however the rectors of sinecures, by having been long excused from residence, are in the common opinion discharged from the cure of souls (which is the reason of the name); and however the cure is said in the law books to be in them *habitualiter* only; yet in strictness of law, and with regard to their original institution, the cure is in them *actualiter*, as much as it is in the vicar. *Gibs.* 719. (*e*) [See *infra*, Sinecure.]

Patronage. 5. The parson by making the endowment, acquires the patronage of the vicarage. (5) For in order to the appropriation of a parsonage, the inheritance of the advowson was to be transferred to the corporation to which the church was to be appropriated; and then, the vicarage being derived out of the parsonage, the parson of common right must be patron thereof. So that if the parson makes a lease of the parsonage (without making a special reservation to himself of the right of presenting to the vicarage) the patronage of the vicarage passeth as incident to it. (*g*) But it was held in the 21 *Ja.* that the parishioners may prescribe for the choice of a vicar. And before that, in the 16 *Ja.* in the case of *Shirley* and *Underhill*, it was declared by the court, that

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(2) By common law the vicar had not the freehold of the church or church-yard, nor could have a *juris utrum* for his glebe, nor be named tenant to the *præcipe* for it without his parson, (2 *Rol.* 336. F.) but now by 14 *Ed.* 3. *st.* 1. *c.* 17., a vicar shall have a *juris utrum*, and recover in other writs as a parson may: and therefore shall have an assize. See Anon. case, 40 *Ed.* 3. 29, 30., cited 3 *Salk.* 377. He shall have aid of the parson, patron, and ordinary. 2 *Rol.* 336. l. 48. So he shall have the trees in the church-yard, for he stands liable for repairs of the chancel. *Semb.* 2 *Rol.* 337. l. 15., *infra*, Church, VI.

(3) *Com. Dig.* tit. Ecclesiastical Persons. (C. 15.)

(4) Both may have cure of souls, institution being the necessary foundation of such cure. *Clerke* v. *Heath*, 1 *Mod.* 13., 1 *Sid.* 426. S. C., called *Clerke* v. *Prinn*, 2 *Keb.* 484., cited 1 *Hagg. Rep.* 162. *Britton* v. *Wade*, *Cro. Jac.* 518., *per Noy*.

(*e*) *Cro. Ja.* 518. 1 *Sid.* 426.

(5) 2 *Rol.* 336. l. 7. 12. 25. 30., 231. l. 3. *Mallit* v. *Trigg*, 1 *Vern. Rep.* 42., *contra*; but there was a lessee of a parson impropriate; but a layman may be a patron of a vicarage. *Com. Dig. Eglise*, (H. 2.)

(*g*) 2 *Rol. Ab.* 59.

though the advowson of the vicarage of common right is appendant to the rectory, yet it may be appendant to a manor; as having been reserved specially upon the appropriation. *Gibs.* 719. (*h*) [80]

Sometimes, upon appropriation, the right of presenting the vicar was given to the bishop, probably to induce his consent; as appeareth from divers instances.

6. There were no vicarages at common law: or, in other words, no tithes or profits of any kind do *de jure* belong to the vicar, but by endowment or prescription; which cannot be presumed, but must be shewn on the part of the vicar. For which reason, the payment of tithes to the parson, is *prima facie* a discharge against the vicar. *Gibs.* 719. (*i*)

Vicar only entitled by endowment or prescription.

7. The first endowment of the vicars cannot be prescribed against by the parson. This was adjudged in the case of *Pringle* and *Child*, *T.* 2 *Ja.* (*k*) Which original endowments therefore being of such authority as no time can destroy; and such causes between parson and vicar as relate to them, or depend on them, being also cognizable in the spiritual court: it were much to be wished, says Dr. Gibson, for the sake of the poor vicars, that diligent search were made after them in the ecclesiastical offices, and other repositories of records [a]; in order to bring to light

Authority of endowments.

(*h*) *Moore*, 894. 2 *Rol. Rep.* 301.
(*i*) *Palm.* 113. *Yelv.* 86. 4 *Mod.* 184.
(*k*) *Noy*, 8. *Moore*, 761. 780.

[a] It may be proper to insert in this place the following proposal of a very learned gentleman, who has generously undertaken the execution of the abovesaid plan; hoping that all who may have it in their power in anywise to contribute towards the completion thereof, will communicate what may have come to their knowledge with respect to any of the particulars: *viz.*

" A proposal for publishing a general repertory of the endowments of vicarages:

" This work is intended for the service both of vicars and of their parishioners. The former usually come into their livings unacquainted with the particulars of their legal incomes; most of which are small, and many quite insufficient: whence they are sometimes tempted to demand more than their dues. But, oftener, they who should pay them, take advantage of the ignorance or doubtfulness of their minister concerning his rights, and refuse to acknowledge them. If he submits to take what they are willing to allow him, he lives in straits and contempt. If he contests the matter, his people become prejudiced against him for some time, if not for ever: and there is great danger that for want of being able to come at the proper evidences in the cause, it may be decided the wrong way.

" Now the principal of these evidences are old endowments. For a vicar may demand what his vicarage was endowed with; and he cannot demand more, unless immemorial usage gives ground for a just presumption, that there was a further endowment, though not now extant. Therefore discoveries of endowments will tend, not

as many as can possibly be found. Especially, since it hath been also adjudged, that if a vicar hath used time out of mind, or for a long time, to take particular tithes or profits, he shall not lose them, because the original endowment is produced and they are not there; but inasmuch as every bishop had an indisputable [82] right to augment vicarages as there was occasion, and this,

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only to the right determination of law-suits but to the prevention of them, by shewing both parties to what they are entitled: and thus will be of common benefit, to the clergy, to impropriators, and to the rest of the laity.

"The most likely places to find them in, are the registries of the bishop, or dean or chapter of the diocese. But, partly by means of national changes and confusions that have happened, partly through the unfaithfulness or negligence of officers, and partly through other accidents; many of the books belonging to these registries are lost from thence: and not a few of them, and likewise of the chartularies and leiger books of dissolved religious houses, in which they recorded, amongst other things, the endowments of their vicarages, are now in various libraries and repositories, publick and private. A list of these endowments, with references to the manuscripts in which they are contained, would certainly be a very useful directory to multitudes of persons, who else would never know where to seek for them: an account, which of them have been printed, and in what works, may save both trouble and expence to those who desire to consult them, and even in cases where no endowments are to be found, preventing a fruitless search will be doing some good.

"Therefore the editor of this proposal hopes, that the publick will approve of his undertaking: in which he hath proceeded so far, as to set down, in alphabetical order, the name, with the date, of every endowment in the registers of the see of Canterbury; and all such as he hath been able to discover in the Lambeth, Cotton, Harleian, and other libraries, or in printed books. He now presumes to request, that the several bishops would favour him with the names, and dates, of all endowments, which are in their respective registries: and that the same assistance may be given him by such of the nobility, clergy, and gentry, as have in their custody ancient records of any kind, in which endowments of vicarages are entered.

AND. COLTEE DUCAREL."

Doctors Commons,
Dec. 3, 1761.

After which he subjoins a list of above 200 endowments of vicarages already discovered; and a specimen of the method he proposes to follow, as thus,

Acley (Linc. Diœc.) Vicar. de ——— Ordinatio vicariæ ecclesiæ parochialis de Acleia Lincoln. Diœc. Dat. Oxon. in festo S. Michaelis A.D. 1343. (Printed in Kennet's Parochial Antiquities, pag. 455. Ex Chartul. S. Frideswidæ Æd. Ch. Oxon.)

Alboldesley (Linc. Diœc.) Vicar. de ——— Ordinatio vicariæ A.D. 1361. Regist. Johan. Gynewell Episc. Lincoln. (Burn) fol. 367, &c.

whether such right was reserved in the endowment or not; the law will presume, that this addition was made by way of augmentation. *Gibs.* 720.

8. The loss of the original endowment is supplied by prescription; that is, if the vicar hath enjoyed this or that particular tithe by constant usage, the law will presume that he was legally endowed with it; by the same reason that it presumes some tithes might be added, by way of augmentation, which were not in the original endowment. *Gibs.* 720. (*m*)

Prescription where the endowment is lost.

9. It is said that all compositions for the endowments of vicarages shall be expounded by the judges of the common law; and if the spiritual court meddle with that matter, they are to be prohibited. *Wats. c.* 39. (6)

Trial of endowments.

But where the dispute is between rector and vicar, being both spiritual persons, it seemeth that the proper cognizance of the cause belongeth to the ecclesiastical judge. (*n*)

And in the case of *Drake* and *Taylor*, *E.* 4 *G.* The vicar libelled for tithes of turnips, and laid his title to them by prescription and endowment: the defendant pleaded, that there is a rectory impropriate, and that time out of mind the rector hath taken tithes of turnips; and he moved for a prohibition, and obtained a rule unless cause shewed: and it was insisted, that in this case both the parties are not ecclesiasticks; for the libel is against a *parishioner*: and it lays a custom which is denied, and must be tried by the common law. But by *Parker* chief justice and the court: Though both parties are not ecclesiasticks, yet the thing in controversy belongs either to one ecclesiastick or another; for either the rector is entitled to the tithes or the vicar; and what matter is it to the parishioner, who has them? for he can only pay them to one: this is properly a dispute what belongs to the vicar upon the endowment; and that evidence which will entitle him to a sentence below, will not enable him to recover here: and if we should grant a prohibition in order to try the custom, yet that will not determine the question upon the endowment; and therefore we ought not to draw them out of that court, which may properly determine the whole matter. And besides, in the spiritual court fifty years make a prescription, though they will not here. And the rule for a prohibition was discharged. *Str.* 87. (7)

[83]

(*m*) 2 *Keb.* 729. *Hardr.* 328.

(6) *Lit. Rep.* 368. The spiritual court cannot try the existence of a vicarage, but see 3 *Salk.* 378. S.C. *contra*. And prohibition will be granted unless the allegation be plainly false in fact. *Smith* v. *Waller*, 1 *Lord Raym.* 587.

(*n*) 2 *Brownl.* 36. See, however, *Modr.* 157.

(7) *Cheeseman* v. *Hebey*. *Willes*, 680. *Acc.*

But the courts of equity frequently determine upon the *interpretation* of endowments.

Favourable construction.

10. Any words in an endowment being doubtful, shall be interpreted by practice, and to the advantage of the vicar. (8) So, in the case of *Barsdale* and *Smith*, though *garba* in the common acceptation relates to corn, yet it appearing that the custom had been for the vicar to have tithe hay, this was judged sufficient to extend it to tithe hay. (*o*) And the same thing was adjudged in the case of tithe wood, as given by the term *altaragia*, upon the same foundation of custom, in the case of *Reynolds* and *Green* (*p*): Or if given there under the name *minutæ decimæ;* custom changes a great tithe, as wood is, into small. (9) Upon the occasion of which case, it was said, that the word *altaragium* shall be expounded according to use. And bishop Stillingfleet observed, that in the settlement of the altarage of Cockrington by Grosthead bishop of Lincoln, not only oblations and obventions, but the tithes of wool and lamb, were comprehended under that name. *Gibs.* 719, 720. (1)

And in the case of *Franklyn* and the master and brethren of *St. Cross*, *T.* 1721: it was decreed, that where *altaragium* is
[84] mentioned in old endowments, and supported by usage, it will extend to small tithes, but not otherwise. *Bunb.* 79. (*q*)

The most difficult, though most common question, that relates to the interpretation of endowments, is, what the vicar shall have in virtue of the phrase *minutæ decimæ.* *Gibs.* 720. (*r*)

Where a vicar was endowed to have the third part of all the tithe corn of such a *manor;* it was adjudged, that he should have tithes of the *freeholders*, as well as of the demesnes of the manor. (*s*) The reason of the doubt was, that freeholders strictly speaking were not parcel of the manor, as such; but it was resolved, in favour of the vicar, that the word manor there should signify the precincts of manor. (2) And so, where the endow-

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(8) For an augmentation of the endowment shall be intended. *Twiss* v. *Brazennose Coll.* *Hardr.* 328. *Ward* v. *Britton*, *Palm.* 222. *Cooke*'s case, 2 *Roll.* 161.

(*o*) *Cro. Eliz.* 633. (*p*) 2 *Bulst.* 27.

(9) 2 *Roll.* 335. l. 45. 1 *Mod.* 50.

(1) An endowment shall be construed liberally: As, if a vicar be endowed of all tithes except corn, he shall have hops, rapeseed, &c. though they be things newly sown in England. (2 *Roll.* 334. l. 40.) So, if he be endowed of small tithes, and arable land is afterwards converted into pasture, he shall have the small tithes of it. (*Id.* 335. l. 23).

(*q*) See Altarage. (*r*) See Tithes, II. and V.

(*s*) *Owen*, 58. 74. [*Heighern* v. *Best*, *Cro. Eliz.* 463.]

(2) Yet a vicar shall not have tithes of the glebe, though severed after the endowment, and if there is no endowment, the vicar cannot

ment is so expressed, that only tithe corn is reserved to the parson; by construction of law, all the rest falls to the vicar. 2 *Roll's Abr.* 335.

In the aforesaid case of *Franklyn* and the master and brethren of *St. Cross;* although by the endowment the vicar was to find the sacrament wine, yet the court were of opinion it should be found by the parishioners, according to the rubrick in the book of common prayer. *Bunb.* 79.

III. *Augmentation of vicarages.*

Dr. Gibson says, it seems to be agreed on all hands, that the ordinary hath power to oblige *spiritual* impropriators to augment vicarages: according to the case of *Hitchcot* and *Thornburgh, H.* 9 *Car.* where the vicar sued the tenant of the master of the choristers of the church of Sarum (the said master being parson), for addition of maintenance in the spiritual court; and prohibition was denied, upon this reason, that the ordinary might compel the parson to an augmentation, there being such a power reserved to him in *all* appropriations (3); and that the lessee (who held for lives according to the statute of the 32 *H.* 8.) came in, subject to the same charge. *Gibs.* 722. 2 *Roll's Abr.* 337.

It is true, this was an appropriation which had never come to the king by any statute of dissolution; but that circumstance of having been conveyed to the king, made no difference with [85] regard to the jurisdiction of the bishop, so long as they were reconveyed to a spiritual hand, as appears from the case of the dean and chapter of *St. Asaph* in the 12 *Ja.* And the books, when they pronounce impropriations *lay fees,* seem to ground

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claim any thing. 2 *Rol.* 335. l. 10. *Palmer,* 426. See *Bonsey* v. *Lee, supra,* 76. n. (8).

(3) In *Lutton* v. *King,* 3 *Salk.* 377., it is said, that if this power of augmentation was not reserved on the creation of the vicarage, the bishop could not augment it; but see *Twisse* v. *Blount, Hardres Rep.* 329. *contra.* Before 31 *H.* 8. *c.* 13. *s.* 2., a vicar might libel in the spiritual court against impropriators for augmentation of his vicarage, (*Com. Dig.* tit. Ecclesiastical Persons, C. 13.) but since by that statute impropriations are made lay fees, the ordinary cannot intermeddle. But there seems to be a difference where a vicar sues a lay impropriator, and where the impropriator is a spiritual person, for in the last case, it is probable, the vicar may sue for an augmentation, and in some cases, where the impropriation is not a lay fee, as in the case of the *Choristers of Salisbury,* where the appropriation of a parsonage was made to them before the statute, and continues so still, in such case the bishop may make an augmentation, if that power is reserved, for the persons are subject to his command. (*Lutton* v. *King,* 3 *Salk.* 377.)

it wholly upon their being in lay hands; and to mean no more, when they say that they become lay fees by the statutes of dissolution, than that by those statutes they came into lay hands. The only question then (he says) is, concerning the bishop's power over *lay impropriators*. *Gibs.* 722. 2 *Roll.* 100.

Before the dissolution of monasteries, the exercise of ordinary jurisdiction in this particular appears beyond all question. Then come the acts of dissolution (4), and say, that the king shall have and enjoy, to him and his heirs for ever, all and singular such monasteries and tithes, *in as large and ample manner*, as the abbots held them; and elsewhere, *in the state and condition that they now be;* and that they who take from the king, shall have and hold and enjoy the same, and have all such actions, suits, entries, and the like, in like manner, form, and condition as before: which acts of dissolution were founded upon the surrenders made by the religious into the hands of the king. *Gibs.* 722.

From whence it hath been argued; that nothing could come into the king's hands in virtue of the surrenders of the religious, but what was theirs; and that the right of the bishop to augment, and of the vicar to claim augmentation, was not theirs. That the most natural construction of the king's enjoying the impropriations *in the same manner, form, and state* as the religious did, is, that he shall enjoy them with the same limitations, privileges, and burdens, as the religious did. That accordingly, it is granted, that exemptions from tythes can be enjoyed by the grantees, only while the lands *remain in their own hands*, because that privilege which was granted to the several orders was not absolute, but *sub modo*, to wit, whilst they were in their own hands. That because reparations of chancels, payments of curates, proxies, synodals, and the like rested upon the religious appropriator, therefore they have always rested upon the lay impropriator. That (by like construction) as the religious held those appropriations with the charge of a competent maintenance for the vicar, at the discretion of the ordinary; so do the lay owners hold their impropriations with the same charge. That the meaning of the parliament was not to
[86] destroy the rights of other men, but only to suppress the monks: that in the several acts of dissolution, there are general savings of rights to all bodies politick and the like, and particularly of "*portions*, which any may or might have had in or "to the premises, or to any part or parcel thereof, in such "like manner, form, and condition, to all intents and purposes, "as if the said acts had not been made;" and therefore, that

(4) 31 *H.* 8. *c.* 13. *s.* 2.

the vicar having then a right to a *congrua portio* (that is, *part or parcel*, as the statute speaks) out of the rectory, with a right to sue the abbot if he denied it; and the bishop having a right to assign such portion, and to enforce the allowance of it by sequestration and other ecclesiastical censures; both the bishop and the vicar have those rights respectively preserved to them in the said general savings: that if it be objected, that those clauses of reservation of right do not expressly mention, either the jurisdiction of the bishop, or the portion of the vicar; the answer is, that neither do they mention the reparation of chancels, or payment of the stipends of curates; yet both these burdens, as having rested upon the religious, passed from them to the king, and from the king to the grantees; that though they are now applied to other ends and uses, than heretofore they were, yet they retain the same nature; and if it had not been understood, that after the conveyance into lay hands they still remained ecclesiastical duties, they might have been recovered, as other chattels or lay fees are, by action of debt or otherwise, at common law, and there had needed no act of parliament to enable laymen to sue for them; nor would the remedy have been given in the spiritual, but most certainly in the temporal courts. *Gibs.* 723.

But notwithstanding all this, it must be acknowledged, that nothing is more peremptorily delivered throughout the books of common law, than the contrary doctrine; namely, that since the dissolution, all impropriations (at least in the hands of laymen) are become mere lay fees, or inheritances of a mere temporal nature (*t*); from whence it is inferred, that therefore all such possessions are entirely freed from the spiritual jurisdiction; and [87] particularly, that the ordinary hath no power to make augmentation of a vicarage, out of any rectory which is in the hands of a lay impropriator. *Gibs.* 723.

And even with respect to *spiritual* impropriators, it may seem from the intire desuetude of the practice, that the ordinary's power over spiritual impropriators, to compel them to augment vicarages, is at least doubtful; and the only augmentations that are now made, are either by private benefaction, or by application of the revenue of first fruits and tenths by the governors of queen Anne's bounty, or both.

By statute 17 *C.* 2. *c.* 3. *s.* 7. power is given to the impropriators of tithes, to unite the same to the parsonage or vicarage of the church or chapel where they lie; or to settle the

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(*t*) 2 *Ventris*, 35. 2 *Mod.* 257.; by which it appears that the case in 3 *Keb.* 829., which says that the court spiritual may grant sequestration on an impropriate parsonage, is ill reported. See also *Comp. Incumb.* ch. 39. & 43., and tit. Church, VI. 6.

same in trust, for the benefit of the said parsonage, or vicarage, or of the curate where the parsonage is impropriate and no vicar endowed, without any licence of mortmain.

Before this statute, to wit, in the 12 *C.* 2. soon after the restoration, a bill was brought into the house of commons, for erecting and augmenting of vicarages, and had a first reading, but proceeded no further; having, as is supposed, been superseded and laid aside (at least for that time) in consideration that the ends proposed in it would be in some degree answered by his majesty's letter to the several bishops respectively, the substance of which is as followeth:

"Our will is, that forthwith provision be made for the aug-
" mentation of all such vicarages and cures, where the tithes
" and profits are appropriated to you and your successors, in
" such manner, that they who immediately attend upon the
" performance of ministerial offices in every parish, may have
" a competent portion out of every rectory impropriate to your
" see. And to this end our farther will is, that no lease be
" granted of any rectories or parsonages belonging to your
" see, until you shall provide, that the respective vicarages, or
" curates' places where there are no vicarages endowed, have so
" much revenue in glebe, tithes, or other emoluments, as com-
" monly will amount to 100*l.* or 80*l.* a-year; or more if it will
" bear it; and in good form of law settle it upon them and their
" successors. And where the rectories are of small value, and
" cannot admit of such proportions to the vicar and curate; our
" will is, that one half of the profit of such a rectory be re-
[88] " served for the maintenance of the vicar or curate, as is agree-
" able to the said proportions. And our farther will is, that
" you do employ your authority and power, which by law
" belongeth to you as ordinary, for the augmentation of
" vicarages and stipends of curates; and that you do with due
" diligence proceed in due form of law for the raising and
" establishing convenient maintenance of those who do attend
" holy duties in parish churches. And if any prebendary in
" any church (the corps of whose prebend consists in tithes)
" shall not observe these our commands, then we require you
" or the dean of the church, to use all due means in law, where
" you or he have power to compel them; or that otherwise you
" report to the bishop of the diocese where the said corps doth
" lie, that he may interpose his authority for fulfilling this our
" order. And if any dean, or dean and chapter, or any that
" holdeth any dignity or prebend in the cathedral church, do
" not observe these our commands, that you call them before
" you, and see this our will obeyed." *Ken. Par. Ant.* 253.

And this design was the more practicable at that time, by reason of the number and largeness of the fines that were then

due. And accordingly, many and large augmentations were then made. But this was not intended barely for augmentations then to be made at that particular time, but also for the making thereof by the same bodies in future times. And to conform and perpetuate the same, the statute of the 29 *C.* 2. *c.* 8. was made as followeth:

Whereas divers archbishops, bishops, deans and chapters, and other ecclesiastical persons, in obedience to his majesty's letters bearing date the first day of *June* in the twelfth year of his reign, and out of a pious care to improve poor vicarages and curacies, where the endowment thereof was found too small to afford a competent maintenance to those that serve the cure, have since his majesty's happy return, upon their renewing of leases of rectories or tithes impropriate or appropriate, made or may hereafter make divers reservations beyond the ancient rent, to the intent the same should or might become payable to the said vicars or curates, in augmentation of their endowments, which have been for the most part enjoyed accordingly; but in regard that such reservations were not made to the vicars or curates, or if they were, no convenient remedy could be had by such vicars or curates for the recovery thereof, and they were not at the time thereof capable of taking any interest to their own use, whereby the said provisions will depend upon the good pleasure of the successors, and may in time be dis- [89]
appointed: Therefore for the establishment of the same, it is enacted, that every augmentation granted or intended to be granted since the said first day of *June*, or which shall at any time hereafter be granted, reserved, or made payable to any vicar or curate, or reserved by way of increase of rent to the lessors, but intended to be for the benefit of such vicar or curate, by any archbishop, bishop, dean, provost, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation, person or persons whatsoever, so making the said reservation out of any rectory impropriate or portion of tithes belonging to them or any of them respectively, shall continue and remain as well during the continuance of the estate or term upon which the said augmentations were granted, reserved, or agreed to be made payable, as afterwards, in whose hands soever the said rectories or portions of tithes shall be or come; which rectories or portions of tithes shall be chargeable therewith, whether the same be reserved again or not; and the said vicars and curates respectively are hereby adjudged to be in the actual possession thereof, for the use of themselves and their successors, and the same shall for ever hereafter be taken, received, and enjoyed by the said vicars and curates and their successors, as well during the continuance of the term or estate upon which the said augmentations were granted, as afterwards; and the said vicars

and curates shall have remedy for the same, either by distress upon the rectories impropriate or portions of tithes charged therewith, or by action of debt against the person who ought to have paid the same, his executors, or administrators; any disability in the person or persons, bodies politic or corporate so granting, or any disability or incapacity in the vicars or curates, to whom or for whose use or benefit the same are granted or intended to be granted, the statute of mortmain, or any other law, custom, or other matter or thing whatsoever, to the contrary notwithstanding. *s.* 1, 2.

Provided always, that no future augmentation be confirmed by virtue of this act, which shall exceed one moiety of the clear yearly value, above all reprizes, of the rectory impropriate out of which the same shall be granted or reserved. *s.* 3.

And every archbishop, bishop, dean, and chapter respectively, on or before September 29 next coming, shall make entry in their registers respectively of every augmentation or other agreement, which shall be kept as a record; and a copy thereof, proved by witnesses, shall be good evidence, whereupon such vicars or curates may recover the benefit of such augmentation. *s.* 4, 5.

[90] And if upon the surrender, expiration, or other determination of any lease wherein such augmentation hath been or shall be granted, any new lease of the premises or any part thereof shall hereafter be made, without express continuance of the said augmentation; every such new lease shall be utterly void. *s.* 8.

And if any question shall arise concerning the validity of such grants, or any other matter or thing in this act contained; such favourable constructions, and such further remedy, if need be, shall be had and made, for the benefit of the vicars and curates, as may be had for other charitable uses, upon the statutes for charitable uses. *s.* 7.

By the statute of the 12 *An. sess.* 1. *c.* 4. provision is made for the augmentation of small livings in the *West Riding* of the county of *York*, by inclosing the wastes therein.

IV. *Vicarages how dissolved.*

Vicarages though duly created, and of long continuance, might be dissolved. The great case in which this point came under consideration, was that of *Britton* and *Wade, M.* 16 *Ja.* (*u*) An appropriation had been made in the time of king John, and so continued till the reign of Hen. 6. when upon the prior's petition to the pope, in regard the priory was poor, the pope granted by

(*u*) *Cro. Ja.* 515. 2 *Ro. Rep.* 97. 127. *Palm.* 113. 219.

his bulls, that for the future the prior should appoint one of his monks to officiate in the cure, who should be removeable at the will of the prior. And this was held to be a good dissolution; because the appropriation, having been made before the 15 *R.* 2. and 4 *H.* 4., was not within those statutes. But Doderidge and Haughton justices held, that if the appropriation had been within the said statutes, neither pope nor ordinary could have dissolved the vicarage; for if they could be supposed to have that power, the great design of the statute of the 2 *H.* 4. (namely, to have a vicar perpetually incumbent) might be defeated at pleasure. And though such a power of dissolution were supposed to be consistent with that statute, it seems by no means reconcilable with the disabling statute of the 13 *El.* c. 10. against the granting or conveying the possessions of vicars, as well as of others, in any other manner than that statute directs. *Gibs.* 720.

But notwithstanding those two statutes, and the opinions of the two learned judges aforesaid: when the case of *Parry* and *Banks* (v) was brought into the exchequer, in the twelfth year of the same king, where a vicarage was endowed upon an appropriation to the dean and chapter of St. Asaph, and in the 24 *Eliz.* was dissolved by the bishop, and united to the rectory, it was held by the barons that the dissolution was *good* (w); because the appropriation being to the dean and chapter, and so remaining in a spiritual hand which was capable of the cure, it might well be dissolved. And this appropriation being one of those which came into the king's hands in the 31 *H.* 8. and by the king transferred to the dean and chapter; the court further resolved that if the impropriation had become a lay fee, in the hands of a temporal possessor, the vicarage could not have been dissolved, because that would be in effect to destroy the cure. *Gibs.* 720. [91]

Two things more are delivered in the books of common law, concerning dissolution of vicarages, and the union thereof to their rectories: 1. That though a vicarage is taken out of the parsonage, and (for the poverty and necessity thereof) may be dissolved and reunited, to supply the parsonage; yet the not presenting for a long time (as for 160 years, which was the case in the books) shall not be a discontinuance of the vicarage (x); but something ought to be shewn of the act of reuniting. 2. If a vicarage is to be dissolved into a parsonage presentative, the king's licence is not necessary, because no loss accrues to the crown; but if it is to be dissolved into a parsonage appropriatory, there

(v) *Cro. Ja.* 518. 2 *Ro. Rep.* 100. *Palm.* 114.

(w) See the true reason in the notes to 17 *Vin. Ab.* 304. *pl.* 6.

(x) For the not presenting a vicar is the default of the parson, of which he ought not to take advantage. [*Robinson* v. *Bedel.*] *Cro. Eliz.* 873.

must be the king's licence, because he for ever loseth his title of lapse. (y) *Gibs.* 720.

If the parson appropriate, who is patron of the vicarage of the same church, doth present the vicar to the parsonage, this is a reunion of the vicarage to the parsonage, so that the presentee shall have all the tithes and other profits of the church. *Wats. c.* 17. (z)

[92] The usual form of the endowment of a vicarage was to this effect.

UNiversis Christi fidelibus præsens scriptum visuris vel audituris; Robertus *permissione divina* Carliolensis *ecclesiæ minister humilis, salutem in Domino sempiternam. Cum nos ad taxationem perpetuæ vicariæ ecclesiæ de* Orton *nostræ dioceseos vocati, priori et conventui ecclesiæ de* Cunninshed *prædictæ ecclesiæ rectoribus quod taxationi prædictæ interessent, si sibi viderint expedire, authoritate apostolica præcepissemus; ac super valorum prædictæ ecclesiæ eadam authoritate per viros fide dignos ad hoc juratos et examinatos plenarie inquisitiones fecissemus; prædictus prior pro se et conventu suo in præsentia nostra constitutus, quoad taxationem prædictam ordinationi nostræ totaliter se submisit. Nos igitur invocata Spiritus Sancti gratia, prædictis facultatibus pensatis prædictæ ecclesiæ, authoritate prædicta, in prædictæ ecclesiæ vicariam perpetuam taxamus quatuor libras et quatuordecim solidos. Pro prædicta summa pecuniæ, perpetuæ assignamus eidem vicariæ portiones inferius scriptas; videlicet, duas mansiones, cum duabus bovatis terræ, cum omnibus earundem casmentis & pertinentibus omnimodis infra villam & extra, ad easdem mansiones cum duabus bovatis terræ ad ipsas spectantibus, quæ propinquiores sunt ecclesiæ prædictæ; et omnes obventiones, mortuaria viva et mortua, et eorum optima vestimenta; oblationes, videlicet, die omnium sanctorum, die natalis Domini, die purificationis beatæ* Mariæ, *et die paschatis; in nuptiis obitibus, purificationibus, et in omnibus aliis devotionibus dictæ ecclesiæ provenientibus; nec non lanæ et agnorum, et si oves et agni ante festum sancti* Martini *in hyeme non tondeantur, vel post dictum festum quovis casu fortuito moriantur, decimæ solvantur debito modo et exigantur; lini, et cannabis, et molendinorum, et alias minutas decimas boscorum, pannagii sylvarum, et aliarum arborum si vendantur, stagnorum, columbariorum, hortorum, turborum in locis quibus fodiuntur, aucarum et anatum, ovorum et pullorum, nec non porcellorum, apium mellis et*

(y) [*Britton* v. *Wade, Cro. Ja.* 518. And see *Com. Dig.* tit. *Eccl. Persons,* (C 11.)]

(z) Per *Windham* J. All appropriations are præternatural; and the church during such time is in bondage, and therefore by presentation is made presentative. [*Wilkinson* v. *Richardson.*] 1 *Keb.* 906.

ceræ, artificiorum, negotiationum, nec non stipendiorum, et omnium proventuum rerum aliarum, de cætero satisfaciant ecclesiæ prædictæ competentur, ut de jure teneantur; et etiam decimas garbarum prædictarum duarum bovatarum terræ prædictæ vicariæ assignatarum. (Exceptis decimis albis pullinorum et vitulorum, decima fœni, nec non et decima propriorum omnium prædicti prioris et conventus in prædicta parochia existentium, cui quas rectori volumus assignari.) Ita quod vicarius qui pro tempore fuerit omnia onera ordinaria et extraordinaria pro portione ipsi contingente, videlicet, [93] *pro tertia parte, plenarie sustinebit. Ipso vero vicario cedente vel decedente, prædicti prior et conventus liberam habeant facultatem ad eandem vicariam clericum idoneum præsentandi. In cujus rei testimonium præsenti scripto sigillum nostrum apponi fecimus; datum apud* Rosam *septimo idus* Aprilis, *anno Domini millesimo ducentesimo sexagesimo tertio, et pontificatus nostri anno quinto.*

The law concerning the residence of vicars upon their benefices, is inserted under the title **Residence.**

Aquae-bajalus. See **Parish-Clerk.**
Archbishop. See **Bishops.**

Archdeacon.

FOR leases made by archdeacons, or sole corporations, see title **Leases.**

1. As deacons were all originally the attendants and servants of their several bishops in church affairs; so it is certain that about the end of the third century, there was in several dioceses one chosen out from among the rest, who had the title of archdeacon: and by degrees this office became universal; and they who had it, being always near the bishop, so improved their advantage, that in process of time they began to share with the bishop in his *authority*. (*a*) *Johns.* 57. *Gibs.* 969. **Original of archdeacons.**

But as the archdeacons, in their original institution, had no relation to the diocese, but only to the episcopal see; so it was by several steps and degrees, that they attained to the power they now enjoy. At their first institution, their proper business was, to attend the bishop at the altar, to direct the deacons and other inferior officers in their several duties for the orderly perform-

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(*a*) As to the antiquity of archdeacons' visitations, *vide Stillingfleet's Miscell.* 242.—For more of archdeacons, *vide Stillingfleet's Ecclesiast. Cases*, vol. i. 337. [*Com. Dig.* tit. *Ecclesiast. Persons*, (C 5.)]

ance of divine service, to attend the bishop at ordinations, and to assist him in the management of the revenues of the church; but without any thing that could be called jurisdiction in the present sense of the word, either in the cathedral or out of it. *Gibs.* 969.

[94] All that while, the *chorepiscopi* had the inspection, under the bishop, of the clergy in the country, and of those parts of the diocese which were remote from the episcopal see; till in the council of Laodicea, in the year 360, it was ordained, that no bishops should be placed in country villages, but only itinerant or visiting presbyters. But the archdeacon, being always near the bishop, and the person mainly entrusted by him, grew into credit and power, and came by degrees (as occasion required) to be employed by him, in visiting the clergy of the diocese, and in the dispatch of other matters relating to the episcopal care: so that by the beginning of the seventh century, he seems to have been fully possessed of the chief care and inspection of the diocese, in subordination to the bishop. *Gibs.* 969.

But this is to be understood with a twofold distinction from the present state and measure of archidiaconal power: 1. That he was employed generally throughout the diocese, at the pleasure of the bishop. Such an archdeacon John de Athon calls the general archdeacon, who hath not an archdeaconry distinctly limited, but supplieth the place of the bishop as his vicar universally; by way of distinction from that archdeacon, who hath a distinct limitation of his archdeaconry, and a separate jurisdiction from that of the bishop. And the first of these is the archdeacon, that we find described in the body of the canon law. 2. That the power of the archdeacons, in that ancient state, was chiefly a power of inquiry and inspection: which Linwood calls a simple inquiry, where he says, that of common right the archdeacon hath power of visitation by way of simple inquiry, as the bishop's vicar; but in such inquiry he hath no power to make corrections in his own name, except in smaller matters, unless custom give him that power. The like doctrine, to that which had been delivered long before by John of Athon: Of common right, saith he, the archdeacons have no power to usurp the greater matters to themselves, but only to report or intimate the same to the bishops. Beyond this, all the rights that any archdeacon enjoys, of what kind soever they be, subsist by grants from the bishops; either made voluntarily, to enable archdeacons to visit with greater authority and effect; or of necessity, as claimed and insisted on by archdeacons, upon the foot of long usage and custom. But whatever might be the motive to these concessions on the part of the bishops; it seemeth that the powers enjoyed by archdeacons, beyond that which they claim of

[95] common right, accrued to them by express grant or composition

(however the evidences may be lost); it being hard to imagine, how deans and chapters, archdeacons, or any other persons, should be allowed to prescribe against a bishop, for any branches of episcopal jurisdiction, and much more for an exemption from it. *Gibs.* 969, 970.

But in virtue of such grants, and of institution to the office they are annexed to; not only the jurisdiction he enjoys is in the eye of the law ordinary jurisdiction, as being in reality a branch of episcopal power, but he himself is properly *ordinarius*, and is recognized as such by the books of common law, which adjudge an administration made by him to be good, though it is not expressed by what authority, because as done by the archdeacon, it is presumed to be done *jure ordinario*. *Gibs.* 970.

The divisions of dioceses into archdeaconries [of which there are sixty in England, *Co. Lit.* 94.], and the assignment of particular divisions to particular archdeacons, are supposed to have begun a little after the Norman conquest; when the bishops, as having baronies, and being tied by the constitutions of Clarendon to a strict attendance upon the kings in their great councils, were obliged to larger delegations of power for the administration of their dioceses, than till that time had been accustomed to do. *Gibs.*970. 1 *Warn.* 275. [See **Courts.**]

For in the charter of William the Conqueror, for appointing the cognizance of ecclesiastical causes in a distinct place or court from the temporal, the archdeacon is mentioned in his ancient general state as the bishop's vicar; where it is said, that "no bishop or archdeacon shall any longer hold pleas in the "hundred concerning episcopal matters." And as this charter did establish what we call the consistory court of the bishop in every diocese; so it did enable the bishop by degrees to assign to particular persons what share of episcopal jurisdiction he thought fit, to be exercised archidiaconally within the districts by him appointed. And as this exercise, by long usage, grew into a claim; so those claims, stiffly maintained on the part of the archdeacons, ended in compositions. Which said assignment of particular powers, to particular persons, within their proper districts, put an end to the *general* capacity of archdeacons, as vicars general, throughout the whole diocese; and made way for those officers, who are known in our provincial constitutions, and the glosses upon them, by the names of vicar general, official, and chancellor to the bishop; and who are vested with a delegated power to exercise, in the place of the [96] bishop, all such jurisdiction as hath not been granted away to others, or that he hath not in the commission reserved to himself. *Gibs.* 970.

2. Archdeaconries are commonly given by bishops, who do therefore prefer to the same by collation: But if an archdeaconry How appointed.

be in the gift of a layman, the patron doth present to the bishop, who institutes in like manner as to another benefice; and then the dean and chapter do induct him, that is, after some ceremonies place him in a stall in the cathedral church to which he belongeth, whereby he is said to have a place in the choir. *Wats. c.* 15. [An archdeaconry being a promotion in the church, having jurisdiction annexed, is a dignity. *Com. Dig.* tit *Ecclesiastical Persons*, (C 16.) citing *Boughton* v. *Gonsley*, *Cro. El.* 663. *semb. cont.*]

Archdeacons by the 13 & 14 *C.* 2. *c.* 4. are to read the common prayer and declare their assent thereunto, as other persons admitted to ecclesiastical benefices; and also must subscribe the same before the ordinary; but they are not obliged by the 13 *Eliz.* to subscribe and read the thirty-nine articles; for although an archdeaconry be a benefice with cure, yet it is not such a benefice with cure as seems to be intended by that statute, but only such benefices with cure as have particular churches belonging to them. *Wats. c.* 15. And they are to take the oaths at the sessions, as other persons qualifying for offices.

Their general power.

3. By the canon law the archdeacon is styled *the bishop's eye*; and hath power to hold visitations (when the bishop is not there); and hath also power under the bishop of the examination of clerks to be ordained, as also of institution and induction; likewise of excommunication, injunction of penances, suspension, correction, inspecting and reforming irregularities and abuses among the clergy; and a charge of the parochial churches within the diocese: in a word, according to the practice of, and latitude given by the canon law, to supply the bishop's room, and (as the words of that law are) in all things to be the bishop's vicegerent. *God.* 61. (*b*)

In general the archdeacon's jurisdiction is founded on immemorial custom, in subordination to the bishop's; and he is to be regulated as to his dignity, office, and power, according to the [97] law, usage, and custom of his own church and diocese. 1 *Still.* 238. *God.* 64.

For in some places the archdeacons have much greater power than in others. As in the diocese of Carlisle; the archdeacon hath no jurisdiction; but he retaineth still that more antient right of examining and presenting persons to be ordained, and of inducting persons instituted.

Archdeacon's official.

4. The judge of the archdeacon's court (where he doth not preside himself) is called the official. *Wood. Com. L. b.* 4. *c.* 1.

Appeal.

5. By the statute of the 24 *H.* 8. *c.* 12. an appeal lieth from the archdeacon's to the bishop's court.

(*b*) [4 *Inst.* 339.] For the duty and powers of an archdeacon by the canon law, see *Dist.* 25. *c.* 1. *Dist.* 94. *X.* 1. 23. *Lynd.* 49. *Ath.* 52. 93.

M. 8 *W. Robinson* and *Godsalve.* Upon motion for a prohibition to stay a suit in the bishop's court, upon suggestion that the party lived within a peculiar archdeaconry; it was resolved by the court, that where the archdeacon hath a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there, and hold court; and in such case, if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted; for the statute intends that no suit shall be per saltum: but if the archdeacon hath not a peculiar, then the bishop and he have concurrent jurisdiction, and the party may commence his suit, either in the archdeacon's court or the bishop's, and he hath election to chuse which he pleaseth: and if he commence in the bishop's court, no prohibition shall be granted: for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there. *L. Raym.* 123. [See 4 *Inst.* 339.]

Arches.

THE person who administers justice in the court of arches, is the official principal of the archbishop; who was called officialis de arcubus, and the court itself curia de arcubus, or Bowchurch (so called from the steeple being raised at the top with stone pillars archwise); and being the church where the dean of those peculiars (commonly called the dean of the arches) held his courts. And because these two courts were held in the same place, and the dean of the arches was usually substituted in the absence of the official while the offices remained in two persons, and the offices themselves have in many instances been united in one and the same person, as they now remain; by these means a wrong notion hath obtained, that it is the dean of the arches, as such, who hath jurisdiction throughout the province of Canterbury: whereas the jurisdiction of that office is limited to the thirteen peculiars of the archbishop in the city of London; and the jurisdiction throughout the province, for receiving of appeals, and the like, belongs to him only as official principal. *Gibs.* 1004. *Johns.* 257. [98]

In like manner the right of jurisdiction in every diocese of the province, during the vacancies of the sees, though vested by patent in the same person, belongs not to him as dean of the arches, but as vicar general of the archbishop. *Gibs.* 104.

And the same person is likewise judge of the peculiars, that is, of all those parishes, fifty-seven in number, which though

lying in other dioceses, yet are no way subject to the bishop or archdeacon, but to the archbishop. *Johns.* 257. (1)

This court of the arches is very antient, and subsisted long before the time of king Henry the second; for Alexander the third, then bishop of Rome, did by his edict to the dean of the arches and Robert Kilwarby then archbishop of Canterbury, abrogate and abolish the then antient statutes of this court, and set up others in their stead; and it was there said, that those antient statutes were then by length of time become not legible. *Conset.* 4.

This court (as also the court of peculiars, the admiralty court, the prerogative court, and the court of delegates for the most part) is now held in the hall belonging to the college of civilians, commonly called doctors commons. *Floy.* 21.

From this court the appeal is to the king in chancery; by the 25 *H.* 8. *c.* 19.

Archipresbyter.

THE *archipresbyter* was so called, because he was in some certain matters and causes set or appointed over the priests or *presbyters*, and such as were of the sacerdotal office: especially in the absence of the bishop. *God. Rep. Can.* 56. (c) [99]

And by the canon law, he that is archipresbyter is also called *dean*. Id.

Arrest in the church or churchyard. See Church.

Articles.

The thirty-nine articles. (2)

1. THE thirty-nine articles were mainly founded upon a body of articles compiled and published in the reign of King Edward the sixth.

They were first passed in the convocation, and confirmed by the royal authority, in the year 1562.

Then they were afterwards ratified anew in the year 1571, in

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(1) The present judge of the arches court and peculiars of Canterbury, and of the prerogative court, is the Right Hon. Sir John Nicholl.

(c) The archipresbyter is now called *Rural Dean*, and is appointed by the bishop and archdeacon to continue during pleasure. For his duty and oath, see tit. Deans and Chapters, VI. also X. 1. 24. and *Dist.* 60.

(2) See *Com. Dig. Esglise*, (N. 10.)

the following form; which form is printed at the end of the said articles, and is that same ratification which is referred to by the 36th canon hereafter mentioned; viz. "This book of articles "before rehearsed, is again approved, and allowed to be holden "and executed within the realm, by the assent and consent of "our sovereign lady Elizabeth, by the grace of God, of Eng- "land, France, and Ireland, queen, defender of the faith, and "so forth. Which articles were deliberately read, and confirmed "again by the subscription of the hand of the archbishops and "bishops of the upper house, and by the subscription of the "whole clergy of the nether house in their convocation, in the "year of our Lord 1571."

Then they were again ratified by king James the first, in these words, which are commonly prefixed to the said book of articles, viz. "Being by God's ordinance, according to our just title, "defender of the faith, and supreme governor of the church, "within these our dominions, we hold it most agreeable to this "our kingly office and our own religious zeal, to conserve and "maintain the church committed to our charge in the unity of [100]
"true religion and in the bond of peace, and not to suffer unne- "cessary disputations, altercations, or questions to be raised, "which may nourish faction both in the church and common- "wealth. We have therefore, upon mature deliberation, and "with the advice of so many of our bishops as might conve- "niently be called together, thought fit to make this declaration "following:

"That the articles of the church of England (which have been "allowed and authorised heretofore, and which our clergy gene- "rally have subscribed unto) do contain the true doctrine of "the church of England, agreeable to God's word; which we "do therefore ratify and confirm, requiring all our loving subjects "to continue in the uniform profession thereof, and prohibiting "the least difference from the said articles, which to that end "we command to be new printed, and this our declaration to "be published therewith:

"That we are supreme governor of the church of England, "and that if any difference arise about the external policy, con- "cerning injunctions, canons, and other constitutions whatsoever "thereto belonging, the clergy in their convocation is to order "and settle them, having first obtained leave under our broad "seal so to do, and we approving the said ordinances and con- "stitutions; providing that none be made contrary to the laws "and customs of the land:

"That out of our princely care that the churchmen may do "the work which is proper unto them, the bishops and clergy "from time to time in convocation, upon their humble desire "shall have licence under our broad seal, to deliberate of, and

"to do all such things, as being made plain by them, and "assented unto by us, shall concern the settled continuance of "the doctrine and discipline of the church of England now "established, from which we will not endure any varying or "departing in the least degree:

"That for the present, though some differences have been ill "raised, yet we take comfort in this, that all clergymen within "our realm have always most willingly submitted to the articles "established, which is an argument to us, that they all agree in "the true usual literal meaning of the said articles, and that even "in those curious points in which the present differences lie,
[101] "men of all sorts take the articles of the church of England to "be for them; which is an argument again, that none of them "intend any desertion of the articles established:

"That therefore in these both curious and unhappy differences, "which have for so many hundred years in different times and "places exercised the church of Christ, we will that all further "curious search be laid aside, and these disputes shut up in "God's promises as they be generally set forth to us in the holy "Scriptures, and the general meaning of the articles of the church "of England according to them; and that no man hereafter "shall either print or preach to draw the article aside any way, "but shall submit to it in the plain and full meaning thereof, "and shall not put his own sense or comment to be the meaning "of the articles, but shall take it in the literal and grammatical "sense:

"That if any public reader in either our universities, or any "head or master of a college, or any other person respectively "in either of them, shall affix any sense to any article, or shall "publicly read, determine, or hold any public disputation, or "suffer any such to be held either way, in either the universities "or colleges respectively; or if any divine in the universities "shall preach or print any thing either way, other than is "already established in convocation with our royal assent; he "or they the offenders shall be liable to our displeasure, and the "church's censure in our commission ecclesiastical, as well as "any other; and we will see there shall be due execution upon "them."

To be subscribed by persons to be ordained deacons or priests.

2, 3. By 13 *Eliz.* c. 12. § 5. None shall be made minister, or permitted to preach or administer the sacraments, unless he first bring to the bishop of that diocese, from men known to the bishop to be of sound religion, a testimonial of his professing the doctrine expressed in the said articles, nor unless he be able to answer and render to the ordinary an account of his faith in Latin according to the said articles, or have special gift or ability to be a preacher; nor shall be admitted to the order of deacon or ministry, unless he shall first subscribe to the said articles.

4. By *Can.* 36. No person shall be received into the ministry, nor either by institution or collation admitted to any ecclesiastical living, nor suffered to preach, to catechize, or to be a lecturer or reader of divinity in either university, or in any cathedral or collegiate church, city, or market town, parish church, chapel, or in any other place, except he shall first subscribe to this article following: viz. That he alloweth the book of articles of religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy in the convocation holden at London in the year of our Lord God one thousand five hundred sixty and two; and that he acknowledgeth all and every the articles therein contained, being in number nine and thirty, besides the ratification, to be agreeable to the word of God.

By persons to be admitted to benefices.

[102]

And by 13 *Eliz. c.* 12. No person shall be admitted to any benefice with cure, except he shall first have subscribed *the said articles* in the presence of the ordinary, § 3.; and all admissions to benefices of any person contrary to this act, and all dispensations, qualifications, and licences to the contrary, shall be merely void in law, as if they never were. § 7.

The said articles.] It hath been doubted by some, what articles are here meant; namely, whether all the 39 articles, or only such of them as are in this act above specified. The case is this: The act requires first of all, that every person under the degree of a bishop, pretending to be a preacher or minister by reason of any other form of institution, consecration, or ordering, than the form set forth in the time of *Ed.* 6. or then used, should before Dec. 25. then next following, declare his assent and subscription to all the articles of religion, *which only concern the confession of the true Christian faith and the doctrine of the sacraments,* comprised in a book imprinted, intituled, "Articles, whereupon it "was agreed by the archbishops and bishops of both provinces, "and the whole clergy, in the convocation holden at London "in the year 1562," &c. After which follow the several clauses requiring subscription to the *said articles* in time to come; and the question is, whether to the whole book of articles, or only to such of them *as concern only the confession of the true faith and the doctrine of the sacraments,* for these only were required in the former part of the act. And there is a remarkable passage in D'Ewes's Journal, p. 239. which explains the aforesaid clause, requiring assent and subscription to some of the articles, and not to all. Mr. Peter Wentworth, in a speech in the house of commons, inveighing against a message of the queen to the house, *that they should not deal in any matters of religion, but first to receive from the bishops,* expresseth himself thus: "I have "heard of old parliament men, that the banishment of the pope [103] "and popery, and the restoring of true religion, had their "beginning from this house, and not from the bishops. And I

"have heard, that two laws for religion had their foundation "from them. And I do surely think (before God I speak it) "that the bishops were the cause of that doleful message; and "I will shew you what moveth me so to think. I was, amongst "others, the last parliament, sent unto the bishop of Canterbury, "for the articles of religion that then passed this house. He "asked us, why we did put out of the book the articles for the "homilies, consecrating of bishops, and such like? Surely, Sir, "said I, because we were so occupied in other matters, that we "had no time to examine them how they agreed with the word "of God. What, said he, surely you mistook the matter; you "will refer yourselves wholly to us therein? No, by the faith "I bear to God, said I, we will pass nothing before we under- "stand what it is; for that were but to make you popes: make "you popes who list, said I, for we will make you none. And "sure, Mr. Speaker, the speech seemed to me to be a pope-like "speech; and I fear lest our bishops do attribute this of the "pope's canons unto themselves, *Papa non potest errare.*" ——

N. B. The articles which concern faith and doctrine are, 1, 2, 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 22. *Gibs.* 321.

By the heads of colleges.

5. By the 13 & 14 *C.* 2. *c.* 4. Every governor or head of any college or hall in either of the universities, or of the colleges of Westminster, Winchester, or Eaton, shall, within one month next after his election or collation and admission into the same government or headship, openly and publicly in the church, chapel, or other public place of the same college or hall, and in the presence of the fellows and scholars of the same, or the greater part of them then resident, subscribe unto the nine-and-thirty articles of religion mentioned in the statute made in the thirteenth year of the late queen Elizabeth, and declare his unfeigned assent and consent unto and approbation thereof; on pain to lose and be suspended from all the benefits and profits belonging to the same government or headship, by the space of six months, by the visitor or visitors of the same college or hall; and if such governor or head so suspended for not subscribing, shall not at or before the end of six months next after such suspension subscribe unto the said articles, and declare his consent thereunto
[104] as aforesaid, then such government or headship shall be *ipso facto* void. § 17.

By chancellors, officials, and commissaries.

6. By *Can.* 127. No man shall be admitted a chancellor, commissary, or official, except before he enter into or execute such office he shall take the oath of supremacy before the bishop or in open court, and subscribe to the 39 articles; the said oath and subscription to be recorded by a register then present.

By lecturers.

7. By the same statute of the 13 & 14 *C.* 2. *c.* 4. No person shall be received or allowed to preach as a lecturer, unless he be first approved, and thereunto licensed, by the archbishop of the

province, or bishop of the diocese, or (in case the see be void) by the guardian of the spiritualities; and shall, in the presence of the said archbishop or bishop, or guardian, read the nine-and-thirty articles of religion mentioned in the statute of the thirteenth year of the late queen Elizabeth, with declaration of his unfeigned assent to the same. § 19.

8. By the 13 *El. c.* 12. *s.* 3. Curates admitted to any benefice with cure (as all perpetual curacies and chapels augmented by the governors of queen Anne's bounty are) shall subscribe the said articles in presence of the ordinary. By curates to be licensed.

9. By *Can.* 77. No man shall be admitted schoolmaster, except he subscribe to the first and third articles in the thirty-sixth canon, concerning the king's supremacy, and the 39 articles, that he acknowledgeth them to be agreeable to the word of God. By schoolmasters.

10. By the aforesaid act of the 13 & 14 *C.* 2. *c.* 4. (which establisheth the present book of common prayer.) All subscriptions to be made to the said articles, shall be construed to extend, for and touching the 36th of the said articles, concerning the book of consecration of archbishops and bishops, and ordaining of priests and deacons, set forth in the time of king Edward the sixth, unto the book containing the form and manner of making, ordaining, and consecrating of bishops, priests, and deacons, in this act mentioned, in such sort and manner as the same did extend unto the said former book set forth in the time of king Edward the sixth. § 30, 31. In what sense the thirty-sixth article is to be subscribed unto.

11. By the 13 *El. c.* 12. Every person to be admitted to a benefice with cure, except that within two months after his induction [or at the same time that he shall read the morning and evening prayer, and declare his assent thereunto, 23 *Geo.* 2. *c.* 28. § 2.] he do publicly read the said articles in the same church whereof he shall have cure, in the time of common prayer there, with declaration of his unfeigned assent thereunto, shall, upon such default, be *ipso facto* immediately deprived. § 3. To be read by ministers after induction. [105]

And all institutions and inductions contrary hereunto, and all dispensations, qualifications and licences to the contrary, shall be merely void. § 7. (3)

12. By *Can.* 5. Whoever shall affirm, that any of the nine-and-thirty articles agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the convocation holden at *London* in the year 1562, are in any part superstitious or erroneous, or such as he may not with a good conscience subscribe Penalty of opposing the same.

(3) By not reading the articles the church is void without sentence of deprivation. *Baker* v. *Brent and another*, *Cro. El.* 680. But title to confer by lapse on such *ipso facto* deprivation does not accrue till six months after notice thereof given by the ordinary to the patron. 13 *El. c.* 12. § 8.

unto; let him be excommunicated *ipso facto*, and not restored but only by the archbishop, after his repentance and public revocation of such his wicked errors.

And by statute 13 *El. c.* 12. If any person ecclesiastical, or which shall have ecclesiastical living, shall advisedly maintain or affirm any doctrine directly contrary or repugnant to any of the said articles, and being convened before the bishop of the diocese, or the ordinary, shall persist therein, or not revoke his error, or after such revocation eftsoons affirm such untrue doctrine; he shall by such bishop or ordinary be deprived of his ecclesiastical promotions. § 2. (4)

Assessment for the repair of the church. See **Church.**
Assets. See **Wills.**

Assise.

ASSISE is a writ that lieth, where any man is put out of his lands or tenements, or of any profit to be taken in a certain place, and so disseised of his freehold.

Of which there are four kinds:

(1) Assise of *novel disseisin*; which is, where tenant in fee-simple, fee-tail, or for term of life, is put out and disseised of his lands or tenements, rents, common of pasture, common way, or of an office, toll, or the like.

(2) Assise of *mort d'ancestor*; which lieth where a man's ancestor, under whom he claimeth, died seised of lands, tenements, rents, or the like, that were held in fee; and after such ancestor's death, a stranger abateth.

[106] (3) Assise of *darrein presentment*; which is, where a man and his ancestors have presented a clerk to a church, and afterwards, the church being void, a stranger presents his clerk to the same church, whereby the person having right is disturbed.

(4) Assise *de utrum*; which lieth for a parson against a layman, or a layman against a parson, for lands or tenements doubtful: whether they be lay fee, or free alms belonging to the church. *Terms of the Law.*

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(4) Sentence of deprivation was passed by the bishop in person upon a clergyman, for publicly, in a sermon, impugning the first article, stating the doctrine of the Trinity; and the second, stating the divinity of our Saviour, and the atonement by his death and sacrifice. *Stone's case*, 1 *Hagg. Rep.* 424.

Audience.

THE archbishop of Canterbury had formerly his court of audience; in which at first were dispatched all such matters, whether of voluntary or contentious jurisdiction, as the archbishop thought fit to reserve for his own hearing. They who prepared evidence, and other materials to lay before the archbishop, in order to his decision, were called auditors. Afterwards this court was removed from the archbishop's palace, and the jurisdiction of it was exercised by the master official of the audience, who held his court in the consistory place at St. Paul's. But now the three great offices of official principal of the archbishop, dean or judge of the peculiars, and official of the audience, are, and have been for a long time past, united in one person, under the general name of dean of the arches; who keepeth his court in doctors-commons hall. *Johns.* 254.

The archbishop of York hath in like manner his court of audience. *Johns.* 255.

Augmentation of small livings by the revenue of the first fruits and tenths. See **First Fruits.**

Avoidance.

[See **Lapse.**]

1. AVOIDANCE, as opposed to plenarty, is, where there is a want of a lawful incumbent on a benefice, during which vacancy the church is *quasi viduata*, and the possessions belonging to it are in *abeyance*. *God. Introd.* 42. — Avoidance, what. [107]

And this happeneth several ways:

2. The most usual and known means, by which any spiritual promotion doth become void, is by the *act of God*, viz. by the death of the incumbent thereof. And such avoidance doth commence from the day of the death of such incumbent. And the patron is obliged to take notice of it at his peril, and not to expect an intimation from the ordinary. *Wats.* c. 1. (*d*) — By death.

3. By resignation; which is the *act of the incumbent*. And this being necessarily made into the hands of the ordinary, and not valid but as admitted by him; the voidance consequent upon it is to be notified by the ordinary to the patron. *Gibs.* 792. — By resignation.

(*d*) 2 *Leon.* 46. *Dyer*, 327. B. 6 *Rep.* 62. But perhaps the six months are only to be reckoned from the time the patron could reasonably be supposed to have notice of the incumbent's death. *Wats.* c. 1.; especially if the incumbent die out of the realm. 2 *Roll. Ab.* 363. [And see 13 *El.* c. 12. § 8. 105. *note* 2.]

By cession. 4. By cession, or the acceptance of a benefice incompatible; which also is the act of the *incumbent*. In which case, the benefice, if of the yearly value of 8l. or above [according to the present valuation in the king's books (5)], is void by stat. 21 *H.* 8. *c.* 13. § 9., and no notice is needful; if under 8l. a-year, it is void by the canon law, and the patron may either present his clerk immediately and require admission, or may sue in the court christian for sentence of deprivation, and wait for notice to be given thereupon, or the ordinary himself may ex mero officio proceed to deprivation, and then give notice.

[By consecration.] [4 *a.* By consecration.] When a parson possessed of ecclesiastical benefices of any kind, is promoted to a bishopric, and there is no dispensation to hold them in commendam with the bishopric; in such case, upon the consecration of the bishop, they become void, and the right of presentation belongs to the crown. *Gibs.* 792. *Wats. c.* 2. (*e*)

But by law in Ireland, no person can take any dignity or benefice there, till he has resigned all his preferments in England: by which resignation the king is prevented of the presentation. Which is said to have been agreed, in the case of the bishops of Durham and Salisbury, upon the promotion of Dr. Rundle to the bishopric of Derry in the year 1735. *Vide* 17 *Vin. Abr.* 371. pl. 8. [108]

By deprivation. 5. By deprivation; which is the *act of the ordinary*: which voidance being created by sentence in the ecclesiastical court, must be notified to the patron; but takes not place presently, if an appeal is depending. *Gibs.* 792. (*g*)

By act of the law. 6. By the *act of the law*; as in case of simony; not subscribing the articles or declaration; or not reading of the articles or the common prayer. All which being voidances by act of parliament, are to be understood (with regard to the times of the commencement of such voidances, and the notice of them) according to the directions and limitations of the respective acts. *Gibs.* 792.

[6 *a.* By *consecration.* See Benefice, I. 10.]

How tried. 7. By the 25 *Ed.* 3. *st.* 3. *c.* 8. Whereas the prelates have shewed and prayed remedy, for that the secular justices do ac-

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(5) *Humphryes* v. *Knight, Cro. Car.* 456. In the case of a cession under the statute, the church is so far void on institution to the second living, that the patron may take notice of it, and present if he pleases: but it would seem that lapse will not incur from the time of *institution* against the patron, unless notice be given him: but lapse will incur from the time of *induction* without notice. 2 *Wils.* 200. 3 *Burr.* 1504.

(*e*) A prebendary of Ely was made dean: query, whether the king or bishop should present. [*The King* v. *Bishop of Ely.*] 1 *Freem.* 256. *Serjt. Hill's MS. Notes.*

(*g*) 2 *Inst.* 631. [See the causes of deprivation, *infra*, Deprivation, and 1 *Blac.* tit. *Com.* 393.]

croach to them cognizance of voidance of benefices of right, which cognizance and the discussing thereof pertaineth to the judges of holy church, and not to the lay judge; the king will and granteth, that the said justices shall from henceforth receive such challenges made or to be made by any prelate of holy church in this behalf, and moreover thereof shall do right and reason.

And the distinction which hath obtained is this: If it come in question, whether the church be full of an incumbent or not, the same shall be tried by the certificate of the bishop, who best knows of the institution; but if the issue to be tried be, whether the church be void or not, the same shall be tried by a jury at the common law, unless the issue to be tried be upon some special act of avoidance, for then the same shall be tried by the certificate of the bishop, so as the especial cause of the avoidance be spiritual. *Hughes*, *c.* 13. *Gibs.* 793. (*h*)

[8. By not complying with the requisites. Vide *post*, Benefice, VII. Serjt. *Hill's* MS. Notes.]

Baptism. [109]

I. *Baptism of infants.*
II. *Public baptism.*
III. *Private baptism.*
IV. *Lay baptism.*
V. *Baptism of those of riper years.*
VI. *Baptism of the children of papists.*
VII. *Baptism of negroes in the plantations.*
VIII. *Fee for baptism.*

I. *Baptism of infants.*

Art. 27. THE baptism of young children is in anywise to be retained in the church, as most agreeable with the institution of Christ.

Rubr. The curates of every parish shall often admonish the people that they defer not the baptism of their children longer than the first or second Sunday next after their birth, or other holiday falling between; unless upon a great and reasonable cause, to be approved by the curate.

(*h*) *Co. Lit.* 344. *a.*

II. *Public baptism.*

Font. 1. At first baptism was administered publicly, as occasion served, by rivers: afterwards the baptistry was built, at the entrance of the church or very near it; which had a large bason in it, that held the persons to be baptized, and they went down by steps into it. Afterwards when immersion came to be disused, fonts were set up at the entrance of churches. 1 *Still. Eccl. Cases,* 146.

Edmund. There shall be a font of stone, or other competent material, in every church; which shall be decently covered and kept, and not converted to other uses. *Lind.* 241.

And by *Can.* 81. There shall be a font of stone in every church and chapel where baptism is to be ministered; the same [110] to be set in the ancient usual places: in which only font, the minister shall baptize publicly.

When. 2. *Rubr.* The people are to be admonished, that it is most convenient that baptism shall not be administered but upon Sundays and other holidays, when the most number of people come together; as well for that the congregation there present may testify the receiving of them that be newly bapitzed into the number of Christ's church; as also because in the baptism of infants, every man present may be put in remembrance of his own profession made to God in his baptism. Nevertheless, if necessity so require, children may be baptized upon any other day.

And by *Can.* 68. No minister shall refuse or delay to christen any child according to the form of the book of common prayer, that is brought to the church to him upon Sundays and holidays to be christened (convenient warning being given him thereof before). And if he shall refuse so to do, he shall be suspended by the bishop of the diocese from his ministry, by the space of three months.

Previous notice. 3. *Rubr.* When there are children to be baptized, the parents shall give knowledge thereof over night, or in the morning before the beginning of morning prayer, to the curate.

Godfathers. 4. *Rubr.* There shall be for every male child to be baptized, two godfathers and one godmother; and for every female, one godfather and two godmothers.

Can. 29. No parent shall be urged to be present, nor be admitted to answer as godfather for his own child: nor any godfather or godmother shall be suffered to make any other answer or speech, than by the book of common prayer is prescribed in that behalf. Neither shall any person be admitted godfather or godmother to any child at christening or confirmation, before the said person so undertaking hath received the holy communion.

5. *Rubr.* And the godfathers and godmothers, and the people

with the children, must be ready at the font, either immediately after the last lesson at morning prayer, or else immediately after the last lesson at evening prayer, as the curate by his discretion shall appoint. At what time to attend.

6. *Rubr.* And the priest coming to the font, which is then to be filled with pure water, shall perform the office of public baptism. Office.

Note, The questions in the office of the 2 *Ed.* 6. *Dost thou renounce*, and so on, were put to the child, and not to the godfathers and godmothers; which (with all due submission) seemeth [111] more applicable to the end of the institution; besides that it is not consistent (as it seemeth) with the propriety of language, to say to three persons collectively, Dost *thou* in the name of this child do this or that? (*i*)

7. By a constitution of archbishop *Peccham*, The ministers shall take care not to permit wanton names, which being pronounced do sound to lasciviousness, to be given to children baptized, especially of the female sex: and if otherwise it be done, the same shall be changed by the bishop at confirmation. *Lind.* 245. Naming the child. (6)

Which being so changed at confirmation (lord *Coke* says) shall be deemed the lawful name. 1 *Inst.* 3.

And this might be so in the time of lord *Coke*; but now the case seemeth to be altered. In the ancient offices of confirmation, the bishop pronounced the name of the child; and if the bishop did not approve of the name, or the person to be confirmed or his friends desired it to be altered, it might be done, by the bishop's then pronouncing a new name: but by the form of the present liturgy, the bishop doth not pronounce the name of the person to be confirmed, and therefore cannot alter it. *Johns.* A.D. 1281, *num.* 3.

8. *Rubr.* The priest, taking the child into his hands, shall say to the godfathers and godmothers, Name this child: and then naming it after them (if they shall certify him that the child may well endure it) he shall dip it in the water discreetly and warily, saying, N., I baptize thee, in the name of the Father, and of the Son, and of the Holy Ghost. Dipping.

But if they certify that the child is weak, it shall suffice to pour water upon it. *Id.*

(*i*) But it seems to be more inconsistent to say to the child, Dost thou *in the name of this child?* The expression, Dost thou, may apply to the sponsors individually.

(6) Lord Eldon apprehends the *Christian* name not necessarily to mean *baptismal* name, and that the name given by anabaptists to their children is in a sense a Christian name, though they baptize later in life than other Christians. See Dissenters.

Note, The dipping by the office of the 2 *Ed.* 6. was not all over; but they first dipped the right side, then the left, then the face towards the font.

Cross. 9. Then the minister shall sign the child with the sign of the cross. And to take away all scruple concerning the same; the
[112] true explication thereof, and the just reasons for the retaining of this ceremony, are set forth in the thirtieth canon. *Rubr.*

The substance of which canon is: That the first Christians gloried in the cross of Christ; that the scripture doth set forth our whole redemption under the name of the cross; that the sign of the cross was used by the first Christians in all their actions, and especially in the baptizing of their children; that the abuse of it by the church of Rome doth not take away the lawful use of it; that the same hath been approved by the reformed divines, with sufficient cautions nevertheless against superstition in the use of it; as, that it is no part of the substance of this sacrament, and that the infant baptized is by virtue of baptism before it be signed with the sign of the cross received into the congregation of Christ's flock as a perfect member thereof, and not by any power ascribed to the sign of the cross; and therefore that the same being purged from all popish superstition and error, and reduced to its primary institution upon those rules of doctrine concerning things indifferent which are consonant to the word of God and to the judgments of all the antient fathers, ought to be retained in the church, considering that things of themselves indifferent do in some sort alter their natures when they become injoined or prohibited by lawful authority.

III. *Private Baptism.*

Rubr. The curates of every parish shall often warn the people, that without great cause and necessity, they procure not their children to be baptized at home in their houses.

Can. 69. If any minister being duly, without any manner of collusion, informed of the weakness and danger of death of any infant unbaptized in his parish, and thereupon desired to go or come to the place where the said infant remaineth, to baptize the same, shall either wilfully refuse so to do, or of purpose or of gross negligence shall so defer the time, as when he might conveniently have resorted to the place, and have baptized the said infant, it dieth through such his default unbaptized; the said minister shall be suspended for three months, and before his restitution shall acknowledge his fault, and promise before his ordinary, that he will not wittingly incur the like again.
[113] Provided, that where there is a curate, or a substitute, this constitution shall not extend to the parson or vicar himself, but to the curate or substitute present.

Rubr. The child being named by some one that is present, the minister shall *pour* water upon it.

And let them not doubt, but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again. Yet nevertheless, if the child which is after this sort baptized do afterward live, it is expedient that it be brought into the church, to the intent that the congregation may be certified of the true form of baptism privately before administered to such child. *Id.*

IV. *Lay Baptism.*

Edmund. Women, when their time of child-bearing is near at hand, shall have water ready, for baptizing the child in case of necessity. *Lind.* 63.

Otho. For cases of necessity, the priests on Sundays shall frequently instruct their parishioners in the form of baptism. *Athon.* 10.

Peccham. Which form shall be thus: *I crysten the in the name of the Fader, and of the Sone, and of the Holy Goste.* Lind. 244.

Peccham. Infants baptized by laymen or women (in imminent danger of death) shall not be baptized again: and the priest shall afterwards supply the rest. *Lind.* 41.

Edmund. If a child shall be baptized by a lay person at home by reason of necessity; the water (for the reverence of baptism) shall be either poured into the fire, or carried to the church to be put in the font: and the vessel shall be burnt, or applied to the uses of the church. *Lind.* 241.

By the *Rubricks* of the 2d and of the 5th of Edward the sixth; it was ordered thus: The pastors and curates shall often admonish the people, that without great cause and necessity *they baptize not* children at home in their houses; and when great need shall compel them so to do, that then *they minister it* on this fashion: First, *let them that be present* call upon God for his grace, and say the Lord's prayer, if the time will suffer: and then *one of them* shall name the child, and dip him in the water, or pour water upon him, saying these words, I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.

In the manuscript copy of the articles made in convocation in the year 1575, the twelfth is, Item, Where some ambiguity and doubt hath arisen among divers, by what persons private baptism is to be administered; forasmuch as by the book of common prayer allowed by the statute, the bishop of the diocese is authorized to expound and resolve all such doubts as shall arise, concerning the manner how to understand and to execute the things contained in the said book; it is now, by the said arch- [114]

bishop and bishops expounded and resolved, and every of them doth expound and resolve, that the said private baptism, in case of necessity, is only to be ministered by a lawful minister or deacon called to be present for that purpose, and by none other: and that every bishop in his diocese shall take order, that this exposition of the said doubt shall be published in writing, before the first day of May next coming, in every parish church of his diocese in this province; and thereby all other persons shall be inhibited to intermeddle with the ministering of baptism privately, being no part of their vocation.

This article was not published in the printed copy; but whether on the same account that the fifteenth article was left out (namely, because disapproved by the crown) doth not certainly appear. However the ambiguity remained, till the conference at Hampton-court, in which the king said, that if baptism was termed private, because any but a lawful minister might baptize, he utterly disliked it, and the point was there debated; which debate ended in an order to the bishops to explain it so, as to restrain it to a lawful minister.

Accordingly, in the book of common prayer which was set forth in the same year, the alterations were printed in the rubrick thus:—And also they shall warn them, that without great cause they *procure not their children to be baptized* at home in their houses. And when great need shall compel them so to do, then *baptism shall be administered* on this fashion: First, let *the lawful minister* and them that be present call upon God for his grace, and say the Lord's prayer, if the time will suffer: and then *the child being named by some one that is present, the said minister shall dip it in the water, or pour water upon it:*—— and other expressions in other parts of the service, which seemed before to admit of lay baptism, were so turned, as expressly to exclude it. *Gibs.* 369.

Nevertheless, bishop *Fleetwood* says, that lay baptism is not declared invalid by any of the offices or rubricks, nor in any
[115] public act hath the church ever ordered such as have been baptized by lay hands to be rebaptized by a lawful minister, though at the time of the Restoration there were supposed to be in England and Wales 2 or 300,000 souls baptized by such as are called lay hands. He says, whether the indispensable necessity of baptism be the doctrine of the church of England or no, he cannot with certainty determine; but because he is persuaded that the church doth not hold lay baptism to be invalid, he is so far persuaded that the church holdeth baptism to be indispensably necessary where it can possibly be had; and will have lay baptism (when a lawful minister cannot be had) rather than none at all. *Fleetw. Works*, 530. (*k*)

(*k*) By the canon law baptism is regularly confined to priests; but

V. *Baptism of those of riper years.*

Preface to the book of common prayer. It was thought convenient, that some prayers and thanksgivings, fitted to special occasions, should be added; particularly, an office for the baptism of such as are of riper years; which, although not so necessary when the former book was compiled, yet by the growth of anabaptism through the licentiousness of the late times crept in among us, is now become necessary, and may be always useful for the baptizing of *natives* in our plantations, and others converted to the faith.

Rubr. When any such persons as are of riper years are to be baptized, timely notice shall be given to the bishop or whom he shall appoint for that purpose, a week before at the least, by the parents or some other discreet persons; that so due care may be taken for their examination, whether they be sufficiently instructed in the principles of the Christian religion, and that they may be exhorted to prepare themselves with prayers and fasting for the receiving of this holy sacrament.

And if they shall be found fit, then the godfathers and god- [116]
mothers (the people being assembled upon the Sunday or holiday appointed) shall be ready to present them at the font, immediately after the second lesson, either at morning or evening prayer, as the curate in his discretion shall think fit.

And it is expedient that every person thus baptized should be confirmed by the bishop, so soon after his baptism as conveniently may be; that so he may be admitted to the holy communion.

VI. *Baptism of the children of papists.*

By the 3 *Ja.* c. 5. Every popish recusant, which shall have any child born, shall, within one month next after the birth, cause the same to be baptized by a lawful minister, according to the laws of this realm, in the open church of the parish where the child shall be born, or in some other church near adjoining, or chapel where baptism is usually administered; or if by infirmity

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in cases of necessity, laymen and even women were allowed to perform the ceremony. *Baptizandi cura ad solos sacerdotes pertinet, ejusque ministerium nec ipsis diaconis explere permittitur, absque episcopo vel presbytero: nisi his procul absentibus, ultima languoris cogat necessitas: quo casu et laicis fidelibus, atque ipsis mulieribus baptizare permittitur.* *Inst. J. C.* 2, 3. X. 8. 42. See also *Lind.* 50. [Baptism by protestant dissenting ministers was established as entitling to burial by the church of England. *Kemp* v. *Wilkes, cor.* Sir *John Nicholl.* 1809. See *infra,* Burial, VI. *note.*

of the child it cannot be brought to such place, then the same shall, within the time aforesaid, be baptized by the lawful minister of any of the said parishes or places, on pain that the father of such child, if he be living one month after the birth, or if he be dead within the said month, then the mother of such child shall forfeit 100*l.*; one third to the king, one third to him who shall sue in any of the king's courts of record, and one third to the poor of the said parish. § 14.

VII. *Baptism of negroes in the plantations.*

It hath been a point debated in the court of king's bench, whether by baptism a negro slave acquires manumission. 3 *Mod.* 120. But this seemeth to be now fully settled in the negative both by divines and lawyers. Bishop Fleetwood says, there is no fear of losing the service and profit of their slaves, by letting them become Christians; that they are prohibited neither by the laws of God, nor of the realm, from keeping Christian slaves; and that slaves are no more at liberty after they are baptized, than they were before. *Fleetw. Works*, 501. And both the lord chancellors Talbot and Hardwicke gave their opinions
[117] the same way.—— Archb. *Secker*'s sermon before the society for propagating the gospel in foreign parts, in the year 1740. (*l*)

VIII. *Fee for baptism.*

Langton. *We do firmly enjoin that no sacrament of the church shall be denied to any one, upon the account of any sum of money: because if any thing hath been accustomed to be given by the pious devotion of the faithful, we will that justice be done thereupon to the churches, by the ordinary of the place afterwards.*

Upon the account of any sum of money.] That is, used to be paid or taken in the administration of any of the sacraments. *Lind.* 278.

Shall be denied.] Or delayed. *Lind.* 278.

Hath been accustomed to be given.] That is, of old, and for so long time as will create a prescription, although at first given voluntarily. For they who have paid so long are presumed at first to have bound themselves voluntarily thereunto. *Lind.* 279.

H. 9 *W.* *Burdeaux* and Dr. *Lancaster*. Burdeaux, a French protestant, had his child baptized at the French church in the Savoy, and Dr. Lancaster, vicar of St. Martin's, in which parish it is, together with the clerk, libelled against him for a fee of 2*s.* 6*d.* due to him, and 1*s.* for the clerk. A prohibition was

(*l*) See *Bl. Com.* vol. i. p. 425, with Mr. *Christian*'s note.

moved for; and it was urged, that this was an ecclesiastical fee due by the canon. By *Holt* chief justice: Nothing can be due of common right: And how can a canon take money out of laymen's pockets? *Lindwood* says, it is simony to take any thing for christening or burying, unless it be a fee due by custom; but then, a custom for any person to take a fee for christening a child, when he doth not christen him, is not good; like the case in *Hobart*, where one dies in one parish, and is buried in another, the parish where he dies shall not have a burying fee: if you have a right to christen, you should libel for that right; but you ought not to have money for christening, when you do it not. 1 *Salk.* 332. 12 *Mod.* 171, 2 *S. C.*]

Bastards. [118]

I. *Who shall be deemed a bastard; and therein of supposititious birth.*
II. *Trial of bastardy.*
III. *Consequences of bastardy.*
IV. *Punishment of the mother and reputed father of a bastard child.*

I. *Who shall be deemed a bastard; and therein of supposititious births.*

1. WE term all by the name of bastards, that be born out of lawful matrimony. 1 *Inst.* 244. *Born out of lawful matrimony.*

2. Lord *Coke* says, By the common law, if the husband be within the four seas (7), that is, within the jurisdiction of the king *Husband within the four seas.*

(7) This rule is now exploded. *Bull. N. P.* 112. *Hargrave's note to Co. Lit.* [126. *a.*] *Shelley* v.——13 *Ves. jun.* 58. 3 *P. Wms.* 275, 276. Generally, during the coverture, access of the husband is presumed, unless the contrary is shewn. 5 *Rep.* 98. 1 *Salk.* 123. 3 *P. Wms.* 276. *Stra.* 925. Non-access, then, can only be proved by shewing the husband to have been elsewhere at the time of conception of the child: and on this proof the issue are bastards. *St. Andrew's case*, 1 *Stra.* 51. *Rex* v. *Inhabitants of Bedall*, 2 *Stra.* 1076. The legitimacy or bastardy of the child of a married woman, living in a notorious state of adultery, is, under all the circumstances, a question for the jury to determine. *Goodright*, *dem. Tompson*, v. *Saul*, 4 *T. R.* 356. *Rex* v. *Lubbenham*, (*Inhabs.*), *id.* 251. Lord *Ellenborough* has said, that this conclusion may be drawn from all the authorities: circumstances which shew a natural impossibility that the husband could be the father of the child of which the wife is delivered, whether arising from

of England, if the wife hath issue, no proof is to be admitted to prove the child a bastard, unless the husband hath an apparent

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his being under the age of puberty (see *Co. Litt.* 244.), or from his labouring under disability occasioned by natural infirmity (but see *infra*, this title, IV. note *a*), or from the length of time elapsed since his death, are grounds on which the child's illegitimacy may be founded. 1 *Bl. Com. by Christian*, 475. *note* (8). Thus non-access of the husband during the whole period of the wife's pregnancy need not be proved; and when he had access only one fortnight before the birth of a child, it was held to be illegitimate: and the court said, that the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock, stands on its own peculiar ground, for the child is in that case legitimated by the recognition of the husband. *Rex* v. *Luffe*, 8 *East*, 193. In *Goodright* v. *Moss*, 1 *Cowp.* 561. *Rex* v. *Brumley* (*Inhabs.*) 6 *T. R.* 330. *Standen* v. *Standen*, *id.* 331. *note*. *S. P. May* v. *May*, 1762. *Tr. at bar*, *Bull. N.P.* 112., the declaration of a reputed wife after the death of her husband, and *vice versâ* (*Rex* v. *St. Peter's Burr. S. C.* 25 *Bull. N. P.* 112.) was held admissible, to prove the illegitimacy of a child, by shewing that no marriage took place, or that it was an illegal one: for on this point the deceased person might have been examined if alive. Whereas it appears from *Rex* v. *Kea*, 11 *East. Rep.* 132. (where Lord *Kenyon* cites and confirms *The King* v. *Reading*, *Annaly's Reports*, 79. *Cas. temp. Hardw.* 79. *Bull. N.P.* 113. *The King* v. *Rook*, 1 *Wills.* 340. *Goodright* v. *Moss*, *Cowp.* 594., cases to the like effect cited in *The King* v. *Luffe*, 8 *East*, 193.) that non-access of the husband cannot be proved by the wife alone, after his death, in order to bastardize her issue (though, *ex necessitate rei*, she may be admitted to prove the adultery); for the husband, if alive, could not be examined to the fact of non-access, in order to bastardize the issue born after marriage: and even if this objection were removed, still the case would not come within the principle on which such hearsay evidence can be made an exception to the general rule (*Phillips on Ev.* 3 ed. 196.); for want of access, implying the continued separation of the parties, must be notorious in the whole neighbourhood where they have resided, and is therefore capable of more satisfactory proof. *Bull. N.P.* 113. In *The King* v. *Kea*, an order of sessions, stated to be founded *in part on* credence given to the wife's testimony of the husband's non-access, was quashed on that account, though in the previous case of *Rex* v. *Luffe* an order of bastardy, stated to be made *as well on the testimony of other witnesses as on the oath of the wife*, was held good; for (per Lord *Ellenborough*, 11 *East*, 132.) the court there intended that the wife had been examined only to those facts which she might legally prove, and not to the non-access of the husband, the principle of public policy precluding her from being a witness to that fact. The child of a married woman may be proved a bastard by other evidence than that of absolute non-access: viz. by evidence of its birth during the notorious cohabitation of the mother with another man, whose name it afterwards took, and of its being considered by all the family as the child of these two, corroborated by reasonable evidence of non-access

impossibility of procreation, as if the husband be but eight years old, or under the age of procreation, such issue is bastard, albeit he be born within marriage. But if the issue be born within a month or a day after marriage, between parties of full lawful age, the child is legitimate. 1 *Inst.* 244. [See *Rex* v. *Luffe*, 8 *East*, 193. *ante* 118. *note* (7).]

Husband's non-access.

3. *H.* 5 *G.* 2. *Pendrell* and *Pendrell.* Upon an issue out of chancery to try, whether the plaintiff was the heir at law of one *Thomas Pendrell*, it was agreed, that the plaintiff's father and mother were married, and cohabited for some months; that they parted, she staying in London, and he going into Staffordshire; that at the end of three years the plaintiff was born. And there being some doubt upon the evidence, whether the husband had not been in London within the last year, it was sent to be tried. And the plaintiff rested at first upon the presumption of law in [119] favour of legitimacy, which was encountered by strong evidence of no access. And it was agreed on the trial at Guildhall before *Raymond* C. J. that the old doctrine of being within the four seas was not to take place, but the jury were at liberty to consider the point of access; which they did, and found against the plaintiff. *Str.* 925. (8)

And so by the rules of the civil law, if the husband be so long absent from his wife, as that by no possibility of nature the child can be his; or if the adulterer and adulteress be so known to keep company together, that by just account of time it cannot fall out to be any other man's child but the adulterer's: it is accounted to be a bastard. *God.* 479. (*m*)

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by the husband, who was constantly resident at a distance. *Goodright, dem. Tompson* v. *Saul*, 4 *T. R.* 356.; and see *Goodright* v. *Moss*, *Cowp.* 594. In case of divorce in the spiritual court, *a vinculo matrimonii*, all the issue born during the coverture are bastards; because such divorce is always upon some cause which rendered the marriage null *ab initio;* as for consanguinity, affinity, impotence (*Co. Lit.* 235. *a.*), or polygamy, &c. The rule, that a person shall not be bastardized after his death, holds only in the case of bastard *eigné* and *mulier puisnè;* and the reason why the spiritual court cannot give sentence to annul a marriage after the death of the parties is, because the sentence is given only *pro salute animæ*, and is then too late. *Pride* v. *Earls of Bath and Montague*, 1 *Salk.* 120. See *Harris* v. *Hicks*, *infra*, Lewdness.

(8) The husband being found to have gone beyond seas above two years before the birth of a child borne by his wife, she remaining at home, the conclusion is irresistible that such child is a bastard. *Rex* v. *Maidstone* (*Inhab.*), 12 *East*, *Rep.* 550. *Regina* v. *Murrey*, 1 *Salk.* 122. *S. P.*; and see *Rex* v. *Alberton*, 1 *Raym.* 395. 2 *Salk.* 483. *S. C.*

(*m*) This passage is also to be found in *Ridley's View of the Civil and Ecclesiastical Laws*, p. 352.; but neither author refers to authorities. The doctrine contained in it, is taken partly from the *Digest*

Impotency. 4. If the husband be castrated, so that it is apparent that he cannot by any possibility beget any issue; if his wife hath issue divers years after, this shall be bastard, although it be begotten
[120] within marriage, because it is apparent that it cannot be legitimate. 1 *Roll's Abr.* 358. (n)

M. 6 *G.* 2. *Lomax* and *Holmden.* In ejectment: The question on a trial at bar was, whether the lessor was son and heir of Caleb Lomax, esquire, deceased; which depended on the question of his mother's marriage. And that being fully proved, and evidence given of the husband's being frequently at London, where the mother lived, so that access must be presumed; the defendants were admitted to give evidence of his inability from a bad habit of body. But their evidence not going to an impossibility, but an improbability only; that was not thought sufficient, and there was a verdict for the plaintiff. *Str.* 940.

Issue of a marriage within the degrees. 5. If a man marry his kinswoman within the degrees, the issue between them is not bastard until divorce found; for the marriage was not void. 1 *Roll's Abr.* 357.

Child begotten after a divorce or separation. 6. [Children begotten after divorce *a mensâ et thoro* shall be taken to be bastards, for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved; but in a voluntary separation by agreement the law will suppose access, unless a negative be shewn. (9)

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and partly from the *Decretal.* The rule of the civil law, *Pater is est quem nuptiæ demonstrant,* is restrained in two cases only, bodily infirmity, and proof of non-access. On the later head, Ulpian says, *Fingamus abfuisse maritum, verbi gratia per decennium, reversum anniculum invenisse in domo sua: placet nobis Juliani sententia hunc non esse mariti filium. Dig.* 1. 6. 6. But it is expressly said that the adultery of the woman shall not prejudice her children, *Non utique crimen adulterii quod mulieri objicitur infanti præjudicat; cum possit illa adultera esse, et impubes—patrem habuisse. Dig.* 48. 5. 9. *cum Gloss.* And therefore the children are provided for in *Nov.* 117. *c.* 8. See also *Craig.* 2. 18. 20. The canon law, on the other hand, declares the offspring of a married woman, if conceived in adultery, to be illegitimate: *Illigitima proles est quam vivo viro uxor ex adulterio concepit, sive cum adultero sive cum viro moretur. X.* 4. 17. 4. Thus the child of a married woman may be proved a bastard by other evidence than that of absolute non-access; as by proof of the child taking the name of the person with whom his mother lived, added to reasonable evidence of non-access on the part of the husband who was constantly resident at a distance from his wife. *Goodright ex dem. Tampson* v. *Saul and others,* 4 *T. Rep.* 357. [and see *Rex* v. *Luffenham (Inhab.), id.* 251.]

(n) But this does not hold with regard to *impotency* [for a man may be *habilis et inhabilis diversis temporibus*]. *Bury's case,* 5 *Rep.* 98. [*Lomax* v. *Holmden, quære,* see *ante* 117. *note* (7).] See Marriage, X.

(9) *St. George's case,* 1 *Salk.* 123. *Newport's case, Bult. MSS. Cas.* 16. *Sidney* v. *Sidney,* 3 *P. Wms.* 268. 275. *Seagrave* v. *Seagrave,* 13 *Ves.* 443.

In one case (1) a child was held legitimate, as born *stante matrimonio* before sentence, though the husband, being convinced it was the offspring of an adulterer, never acknowledged it.

7. All children inheritors, which shall be born without the ligeance of the king of England, shall have the same benefit of inheritance as if they were born within the king's ligeance: so always, that the mothers of such children do pass the sea by the licence and wills of their husbands. And if it be alleged against any such born beyond the sea, that he is a bastard, in case where the bishop ought to have cognizance of bastardy; it shall be commanded to the bishop of the place where the demand is, to certify the king's court where the plea thereof hangeth, as of old times hath been used in the case of bastardy alleged against them which were born in England. 25 *Ed.* 3. *st.* 2. Child born out of the king's allegiance.

8. To the king's writ of bastardy, whether one being born before matrimony may inherit in like manner as he that is born after matrimony; all the bishops answered, that they would not, nor could not answer to it, because it was directly *against the common order of the church.* And all the *bishops instanced the lords,* that they would consent, that all such as were *born afore matrimony should be legitimate,* as well as they that be born *within matrimony,* as to the succession of inheritance, forasmuch as the church accepteth such for legitimate. (2) And all the earls and barons with one voice answered, "*that they would not change* "*the laws of the realm, which hitherto have been used and ap-* "*proved.*" 20 *H.* 3. *c.* 9. (3) Child born before the parents' marriage. [121]

Against the common order of the church.] For the better understanding of which, it is to be known, that in the time of pope Alexander the third, which was in the 6 *H.* 2., this constitution was made, that children born before solemnization of matrimony, where matrimony followed, should be as legitimate to inherit unto their ancestors, as those that were born after matrimony; and thereupon the statute saith, that the church accepteth such for legitimate. 2 *Inst.* 96.

The bishops instanced the lords.] Hereupon these two conclusions do follow: 1. That any foreign canon or constitution made by authority of the pope, being against the law and custom of the realm, bindeth not until it be allowed by act of parliament; which the bishops here prayed it might have been; for no law or custom of England can be taken away, abrogated, or annulled, but by authority of parliament. 2. That although the bishops were spiritual persons, and in those days had a great dependency on

(1) *Routledge* v. *Carruthers*, 4 *Dow. P. C.* 392.
(2) According to civil law, *Nov.* 89. *c.* 8.
(3) The reasons in favour of the law of England in this particular are summed up, 1 *Bl. Com.* 455, 456.

the pope; yet in case of general bastardy, when the king wrote to them to certify who was lawful heir to any lands or other inheritance, they ought to certify according to the law and custom of England, and not according to the Roman canons and constitutions, which were contrary to the law and custom of England, wherein the bishops sought at this parliament to be relieved. 2 *Inst.* 97.

Child born after the father's death, and the mother married again.

9. If a man had a wife and dieth, and after within a short time the wife marrieth again, and within nine months hath a child, so that the child may be the child of the first or of the second husband; in this case, if it cannot be known by circumstances, the child may [when he arrives at years of discretion] chuse the first or second husband for his father. 1 *Roll's Abr.* 357. [And is said to be more than ordinarily legitimate. *Co. Litt.* 8.]

By the civil law, such as were born in the beginning of the eleventh month after the decease of their mother's husband, were to be accounted legitimate: but such as were born in the end thereof, were to be accounted bastards; yet the gloss there relates to a matter of fact contrary to this law, and gives us an instance of a widow in Paris who was delivered of a child the fourteenth month after her husband's death; yet the good repute of this woman's continency prevailed so much against the letter
[122] of the law, that the court judged the causes of childbirth to be sometimes extraordinary, the woman to be chaste, and the child legitimate. But this, as the gloss addeth, ought not to be easily drawn into example. *God.* 482.

It was found by verdict, that Henry the son of Beatrice, which was the wife of Robert Radwell deceased, was born eleven days after a woman's furthest lawful time. And thereupon it was adjudged, that he was not the son of Robert. Now the time (saith lord *Coke*) in that case appointed by the law, at the furthest is nine months, or forty weeks; but she may be delivered before that time. 1 *Inst.* 123.

[Note, In the foregoing case, instead of *the furthest lawful time*, it might have been better to have said *the common usual time.*] (*o*)

(*o*) Or rather that the usual time is nine solar months and ten days. 1 *Bac. Ab.* 312. Mr. *Hargrave*, in his edition of *Co. Lit.* 123. *b.*, has given a learned note on the case of Radwell, by which it appears, that he languished of a fever a long time, and that he had not access to his wife for one month before his death; from which, says the record, *præsumitur dictum Henricum esse bastardum.* An excess of forty weeks therefore creates a presumption against the legitimacy of the issue, but is not conclusive. Lord *Hale* says, *partus potest protrahi* ten days, *ex accidente, ib.* The maxim of the civil law, which is also adopted by *Bracton*, is, *pater is est quem nuptiæ demonstrant.* *Dig.* 2. 4, 5. But it was requisite that the child should not be born till the seventh month after marriage. *Dig.* 1. 5. 12. This rule was

M. 7 J. Alsop and *Bowtrell.* Ejectment for lands in Munden in the county of Hertford. The question upon evidence to the jury was, whether Edmund Andrews dying the twenty-third of March, and his wife being with child, but not delivered until the fifth of January following (which was forty weeks and nine days, and then delivered of a daughter named Elizabeth), shall be reputed the father to the said Elizabeth, or that she were a bastard. For it was proved, that he fell sick upon the twenty-second day of March, and died the day following of the plague; and that Edmund Andrews (father of the said Edmund, who was dead), in malice to his son's wife, did much abuse her, and caused her to be dislodged from places where she was harboured, and to lie in the cold streets; and that she was so used for six weeks together before her travail; and she being brought into a woman's house, who commiserated her case, having warmth and sustenance, was presently within twenty-four hours delivered of the said Elizabeth.

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founded on the opinion of Hippocrates, who fixes the shortest time of gestation at six months and two days, or 182 complete days. See *Huber prælect. ad Pand.* 1. 5. 4. The longest time was fixed at ten months. *Post decem menses mortis natus non admittetur ad legitimam hereditatem. Paulus Dig.* 38. 16. 3. § *penult. Sande*, an approved reporter of decisions in the court of Friezeland, disousses this question at large, and gives an instance of a child being decided to be legitimate which was born 333 days, or eleven solar months and three days, after the death of the father, who had been confined to his bed a fortnight before he died. The mother was a woman of excellent character; but the judges hesitated, and recommended a compromise to the parties, which not taking effect, the child was adjudged heir to the defunct. *Dec. Lib.* 4. *Tit.* 8. *Def.* 10. It is there said, that the ill state of the husband's health might be a cause why the child was not born within the ordinary time. This must be allowed to be a singular case; but the claim of the Countess of Glocester, in *Ed.* 2., mentioned in the note above referred to, after a year and seven months is more so; as also the dictum of *Rolfe*, 1 *H.* 6. 3. *a.*, that a woman may be ensient seven years, though his opinion in other respects is sensible. The learned editor above referred to put the following questions to the late Dr. *Hunter*: — What is the *usual* period for a woman's going with child? What is the earliest time for a child's being born alive? and, What the latest? who answered them in the following manner:—1. The usual period is nine calendar months; but there is very commonly a difference of one, two, or three weeks. 2. A child may be born alive at any time from three months; but we see none born with powers of coming to manhood, or of being reared, before seven calendar months, or near that time. At six months it cannot be. 3. I have known a woman bear a living child in a perfectly natural way fourteen days later than nine calendar months; and believe two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception. *Co. Lit. Ed. Harg.* 130. *b.*

And this being proved, and this misusage, by five women of good credit, and two doctors of physic, viz. Sir William Paddy and doctor Mundford, and one Chamberlaine (who was a physician, and in nature of a midwife), upon their oath; they affirming that the child came in time convenient to be the daughter of the party who died; and that the usual time for a woman to go with child, was nine months and ten days, to wit, solar months, that is thirty
[124] days to the month, and not lunar months; and that by reason of the want of strength in the woman or the child, or by reason of ill usage, she might be a longer time, viz. to the end of ten months or more; the court held here, that it might well be as the physicians had affirmed. And the physicians further affirmed, that a perfect birth may be at seven months, according to the strength of the mother, or of the child; which is as long before the time of the proper birth: and by the same reason it may be as long deferred by accident, which is commonly occasioned by infirmities of the body, or passions of the mind. And so the court delivered to the jury, that the said Elizabeth who was born forty weeks and more after the death of the said Edmund Andrews, might well be the daughter of the said Edmund. *Cro. Jac.* 541. (*p*)

Supposititious births.

10. The author of *Fleta*, who lived in the reign of Edward the second, hath a whole chapter about supposititious births; where he tells us, what remedy the right heir had in such case, viz. That a writ was directed to the sheriff, to cause the woman who pretended herself to be with child, forthwith to appear in the county court, there to be searched by discreet and lawful women. And if it was doubtful to them whether she was with child or not, then the sheriff might commit her to some castle, there to continue. And no woman with child was to come near her, until she should be delivered. And this writ was used above sixty years before the author of *Fleta* wrote, viz. in the 5 *H.* 3., when the widow of William Constable of Manton in Norfolk was found guilty of this cheat. And in all probability it was of use in the Saxon times: for the form of the writ is, to command the sheriff to summon the woman to appear in the full county: as it is generally known, that all business of the law was then transacted in that court, where the bishop sate with the civil magistrate. *Nels. Rights of the Clergy*, tit. *Bastards.*

But afterwards, when the courts at Westminster came to be established, then was the writ *de ventre inspiciendo* framed; by which the sheriff was commanded, that in the presence of twelve knights and so many women, he should cause examination to be made, whether the woman was with child or not; and if with
[125] child, then about what time it would be born; and that he certify

(*p*) *Palm.* 9. S. C., where it is said the wife was "un lewd et light damosel."

the same to the justice of assize or at Westminster, under his seal, and under the seals of two of the men present. *Id.* (*q*)

We have two instances of this writ in the books; the one in Easter term in the 39 *El.* which was thus: Percival Willoughby and Bridget his wife, one of the coheirs of Sir Francis Willoughby (because Sir Francis died seised of a great inheritance, having five daughters, whereof the eldest was married to Percival Willoughby, and not any son; and the said Francis leaving his wife Dorothy, who at the time of his death pretended herself to be with child by Sir Francis, which if it were a son, all the five sisters should thereby lose the inheritance descended unto them), prayed a writ *de ventre inspiciendo* out of the chancery, directed to the sheriff of London, that he should cause the said *Dorothy* to be viewed by twelve knights, and searched by twelve women in the presence of the knights, *et ad tractandum ubera, et ventrem inspiciendum*, whether she were with child, and to certify the same into the court of common pleas; and if she were with child, to certify for how long time in their judgments, and when she would be delivered. Whereupon the sheriff accordingly caused [126] her to be searched, and returned, that she was twenty weeks gone with child, and that within twenty weeks she would be delivered. Whereupon another writ issued out of the common pleas, commanding the sheriff safely to keep her in such an house, and that the doors should be well guarded, and that every day he should cause her to be viewed by some of the women named in the writ (wherein ten were named), and when she should be delivered that some of them should be with her to view the birth whether

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(*q*) Mr. *Hargrave*, in the note above referred to (*Co. Lit.* 123. *b.*), vindicates this proceeding from the charge of indelicacy; for though the jury consisted of men and women, the search was to be made by the latter only. See on this subject *ex parte Ayscough*, 2 *P. Wms.* 591., where the rigour of the proceedings under this writ was softened; with Mr. Hargrave's note to *Co. Lit.* 8. *b.* The writ also lay for the heir, if a woman soon after the death of her husband married, and feigned herself with child by her first husband, but the proceedings under it were different. *Co. Lit. ib.* In the matter of *Martha Brown ex parte Wallop*, *Eyre* and *Ashhurst*, lords commissioners, ordered the writ to issue against a married woman (whose husband had been near ten years abroad) on the application of a devisee in a will; there being a limitation in the will, that if she had a male child within forty weeks after testator's decease, it should take previous to the devisee; but the writ was ordered to lie in the office fourteen days; and if within that time she chose to submit to an examination by two midwives, to be appointed by the petitioner, to inspect and examine by such examination as they should think necessary, whether she were pregnant; then the writ not to go till further orders; otherwise to issue. See the petition and affidavits in 4 *Brown. Cha. Rep.* 90, and see *Com. Dig.* tit. *Bastard*, (C.)

it be male or female, to the intent there should not be any falsity. And upon this writ the sheriff returned, that accordingly he had done, and that such a day she was delivered of a daughter. *Cro. El.* 566.

Note, this writ, and the proceedings thereupon, are grounded upon *Bracton, b.* 2. *p.* 69. and upon the writ in the *Register, p.* 227.

The other case was in Easter term, 22 *J.* which was thus: Alphonsus Theaker, cousin and heir of William Theaker, after the death of William Theaker, because he had not any issue alive at the time of his death (but Mary his wife was then supposed to be ensient by him, and within one week after his death was married again to one John Duncomb), procured out of the chancery a writ *de ventre inspiciendo* of the said Mary, directed to the sheriff of London, to cause the said Mary to be searched, whether she were with child by the said William Theaker, and when she would be delivered (no mention being made of her second marriage), and this writ was according to the precedent of the 39 *El.* of the like writ against the Lady Willoughby. And this writ was returnable in the common pleas. The sheriff returned, that he had caused her to be searched, and returned the inquisition, that by such persons he caused her to be searched, and found her to be ensient, and that she would be delivered within twenty weeks. Wherefore he now prayed a second writ out of the common pleas, to be directed to the sheriff of Surrey, because she was moved with her husband to Wandsworth in Surrey, and there inhabited, that the sheriff might take her into his custody, and keep her until she were delivered of her child, that there might not appear to be any false or supposititious birth, and that in the mean time he should cause her to be viewed every day by certain matrons named by the court in the writ, and that some of them might be at the birth of the child, according to the said
[127] precedent of the lady Willoughby. But because in that case the lady was a widow, and so such a course might well be observed, but here she was a feme covert who ought to cohabit with her husband, they would not take such a course with her, but left her with her husband, he entering into a recognizance that she should not remove from the house wherein they then inhabited; and that one or two of the women returned by the sheriff should see her every day, and that two or three of them should be present at her travail: for it was said, that this issue might be well said to be the child of the first husband, and should inherit his land. So that if there were any false or supposititious birth, the cousin and heir might be disinherited. Wherefore a writ was accordingly awarded to the sheriff of Surrey, to cause her to be seen every day until her delivery, by two at least of the said women returned by him; and that three of them or more should be present with her at her delivery, so as no falsehood

might be in her birth. And after this course observed, she was delivered of a female child, who was afterwards by inquisition found to be the daughter and heir of the said William Theaker deceased. *Cro. Ja.* 685.

And this whole procedure seemeth to be deduced from the rules of the civil law, which is particularly express and punctual in this behalf. For by that law, the woman who supposeth herself to be with child, must intimate it twice in every month to those who are nearest concerned, that they may send five women to inspect her; and she must do the like for the space of a month before she expects to be delivered, that they may send some person to be there at that time. The judge may appoint in what house she shall dwell, and the room wherein she lies must be searched; and if there be more than one door, it must be nailed up; and three men, and as many women, must be set to watch her as often as she comes into the chamber, who are also to search all persons who come into the house and chamber. When she is in labour, five women sent by the party next concerned, must be witnesses to the birth, of which they must have notice beforehand: and there must be no more in the chamber at that time, but ten women, two midwives, and six servants, of which none must be with child, and therefore may be searched before they go in; there must be three lights in the room; the child when born must be shewed to those who are concerned; the judge must appoint who shall keep it, unless the father hath otherwise appointed: and it must be shewed twice in a month till it is three months old, and afterwards once in a month till it is [128] six months old; and once in two months till it is a year old; and from thence once in six months till it can speak. And if any thing is done contrary to the premises, or not permitted to be done; then upon proof thereof, the child is not to be admitted to the possession of the estate. *Nels. ibid.* (r)

II. *Trial of bastardy.*

Bastardy general and special.

1. General bastardy is to be tried by the bishop; special bastardy by the country. 1 *Roll's Abr.* 361. (4)

(r) This passage is taken from the edict of the Prætor contained in *Law* 1. § 10. of the Digest, under the title *De inspiciendo ventre custodiendoque partu*, and the regulations mentioned in it were to take place when a woman affirmed herself to be pregnant after the death of her husband. The same title prescribes what is to be done upon a divorce, if the husband affirms the pregnancy of his wife, and she denies it. And the preceding title treats of the *Plancian senatus-consult.*, which allows the *woman* to announce her pregnancy within thirty days after the divorce.

(4) 2 *Inst.* 99. *Co. Litt.* [245. *a.*] note 181. 7 k. *Hill* v. *Barne*, 2 *Lev.* 250. *Hobart.* 179. *Dyer*, 79.

Before the statute of the 20 *H.* 3. *c.* 9. above recited, the party pleaded not general bastardy, but that he was born out of espousals; and the bishop ought to certify whether he were born before espousals or not, and according to that certificate to proceed to judgment according to the law of the land. And the prelates there anwered, that they could not to this writ answer; and therefore ever since, special bastardy, viz. whether the person was born before espousals or after? hath been tried in the king's courts, and general bastardy in the court christian. 2 *Inst.* 98. (5)

And therefore if general bastardy be pleaded in disability of the plaintiff (as if it be alleged that his parents were never accoupled in lawful matrimony), the same shall be tried by the certificate of the bishop whether it be in a real or personal action; but if the marriage be confessed, and it be only pleaded, that the plaintiff was born at such a place before the marriage was solemnized, and so bastard, this is a special bastardy, and shall be tried by a jury at the common law, where the birth is alleged. *Hughes*, *c.* 29. *Johns.* 264.

First to be moved in the temporal court.

2. The question of bastardy or legitimacy ought first to be moved in the king's temporal court, and thereon * issue ought to be joined there; and then it ought to be transmitted by the king's writ to the ecclesiastical court, to be there examined and tried. *God.* 489. (*s*)

*[129]

And if the ecclesiastical court undertake the examination of bastardy or legitimation, without the direction of the temporal court, a prohibition lies; for this affects the temporal inheritance of the subject. 1 *Roll's Abr.* 361. *God.* 489. *Johns.* 263.

Writ to the ordinary to certify.

3. By the 9 *H.* 6. *c.* 11. All justices in the courts where any plea shall be depending wherein bastardy shall be alleged against any person party to the same plea, and thereupon an issue joined which by the law ought to be certified by the ordinary; one of the judges of the court where the plea shall be depending, before that any writ of certificate shall pass out of the same court to the ordinary to certify upon the issue so joined, shall make remembrance under his seal, at the suit of the demandant or tenant, plaintiff or defendant, reciting the issue that is joined in such a plea of bastardy, and certifying to the lord chancellor, to the intent that thereupon proclamation be made in the court

(5) But general bastardy may be tried by the country when it is not directly in issue; or if it be alleged in a dead person, or stranger to the action; or in an infant plaintiff or defendant; or if pleaded in abatement, or as a justification for slandering plaintiff with name of bastard. See *Com. Dig.* tit. *Bastard*, (D 2.)

(*s*) The king's courts of record may write to the bishop to certify. 1 *Inst.* 134. See tit. Bishops, IV. 11. and *Com. Dig.* tit. *Bastard*, (D 2.)

of chancery by three months, once in every month, that all persons pretending any interest to object *against the party which pretendeth himself to be mulier,* that they sue to the ordinary to whom the writ of certificate shall be directed, to make their allegations and objections against the party which pretendeth him to be mulier, as the law of holy church requireth: and the said chancellor, having notice of the said remembrance and issue joined, and being required by the said demandant or tenant, plaintiff or defendant, having the said remembrance, to make proclamation as aforesaid, the same chancellor shall cause proclamation to be made in form aforesaid, and shall certify the same so made in the court where the plea, in which the bastardy is alleged, another time shall be depending. And the judges of the court where such plea shall be depending, before any proclamation so to be made in the chancery, shall make one time such proclamation openly in the same court, and also another time when the proclamation shall be certified by the chancellor as aforesaid. And then the said judge shall award the said writ of certificate to the ordinary, to certify upon such issue so joined. And if any writ of certificate be made or granted, before all the said proclamations be made and certified as aforesaid; then the same writ of certificate, and also the certificate of the ordinary thereupon, *shall be void in law and of none effect.*

Against the party which pretendeth himself to be mulier] Mulier hath three significations: 1. It signifieth a woman in general. 2. A virgin. 3. A wife; and this is the most proper signification of it in our laws: and a son or daughter born of a lawful wife, is called *filius mulieratus* or *filia mulierata*, a son *mulier*, or a daughter *mulier*: and it is always used in contradistinction to a bastard; thus a bastard is an illegitimate issue, and *mulier* is legitimate. 1 *Inst.* 243. (*t*) [130*]

Shall be void in law and of none effect] Before this act, bastards had a way of tricking themselves (as it were) into legiti-

(*t*) If a man has two sons, the eldest of whom is a bastard and the second legitimate, the eldest is called *bastard eigné*, and the second *mulier puisné*. And if the bastard enter on the lands of his father, and die seised thereof, leaving issue, the *mulier* has no remedy; because, as lord *Coke* says, *Justum non est aliquem post mortem suam facere bastardum qui toto tempore vitæ suæ pro legitimo habebatur.* *Co. Lit.* 244. *a.* To which may be added, that such a bastard is *mulier* by the ecclesiastical law: and therefore hath a colour to enter as heir to his father. *Finch. Law,* 118. But this rule applies only to the case of *bastard eigné* and *mulier puisné*, where the father and mother intermarry after the birth of the bastard (1 *Salk.* 121.); for a jury may try the fact which proves a marriage void, and thereby bastardize the issue after the death of the parties, although it is then too late for the spiritual court to proceed *pro salute animæ*, *ib.*

macy. For they used to bring feigned articles, and suborned witnesses before the bishop to prove their legitimation, and then got the certificate returned of record; and after that, their legitimation could never be contested. For being returned of record, as a point adjudged by its proper judges, and remaining among the memorials of the court, all persons were concluded by it. And this created great inconveniencies; for the evidences of the contrary parties concerned were never heard at the trial, and yet their interest was concluded. And to remedy these inconveniencies, this act was made.

Ordinary certificate conclusive.

4. The bishop's certificate, made in due form of law, shall not be gainsayed; but credit shall be given to the same, so as the whole world shall be bound and estopped thereby. *God.* 489. (*u*)

[131]

Bastardizing after the parent's death.

5. The spiritual court cannot give sentence to annul a marriage after the death of the parties: because sentence is given there only *pro salute animæ*, which cannot be after their death; and therefore the sentence in such case is only to disinherit the issue, which they cannot do; for by such means any one might be disinherited. 1 *Roll's Abr.* 360. 1 *Salk.* 120.

III. *Consequences of bastardy.*

Name.

1. A bastard is *quasi nullius filius*, and can have no name of reputation as soon as he is born. 1 *Inst.* 3. (6)

(*u*) The law on this point seems to be, that if a man be certified a bastard, he is concluded against all the world, even although he were a stranger to the suit. [But see 2 *Rol.* 584. *l.* 25. 30. *Countess of Portland* v. *Cole*, 3. *Leo.* 11. cited *Com. Dig.* tit. *Bastard* (D 2.)] But if he be certified *mulier* in a suit between him and J. S., this shall not bind strangers; for a man may be *mulier* by the spiritual law, which holds that *subsequens matrimonium tollit peccatum precedens*, and yet bastard by our law. 1 *Roll. Ab.* 362. *Vin. Ab. Bastard*, M. 6 *Rep.* 65. Though Brook under his title says, that the ordinary in this case ought to certify according to the common law, and not according to the law of the church. See also *supra*, I. 8. Another reason for the difference is, that bastard by the church law must be bastard by the common law; but legitimacy and mulierty are different enquiries; for a man is *mulier* if born in lawful wedlock, but may notwithstanding be proved illegitimate by proof of non-access or impotency. But a verdict of a jury finding a man bastard, binds only the parties who are privy to it. 1 *Roll. Ab.* 362.

(6) The rule of *nullius filius* applies only to the case of *inheritances*. *Rex* v. *Hodnett*, 1 *T. R.* 101. and see *Pride* v. *Earls of Bath*, *&c.* 1 *Salk.* See as to bastards' claims under wills, *infra* Wills, III. 12. *note*. A bastard who has acquired no name by reputation, can only be entitled to the name of the mother (*Wakefield* v. *Mackay*, 1 *Phillimore's Rep.* 133, 134. 143.); and it is natural and proper that

2. But after he hath gotten a name by reputation, he may purchase by his reputed or known name, to him and his heirs; although he can have no heirs but of his body. 1 *Inst.* 3. (*v*) Inheritance.

If the issue of a bastard purchaseth land, and dieth without issue; though the land cannot descend to any heir of the part of the father, yet to the heir of the part of the mother it may; for the heirs of the part of the mother make not any conveyance by the bastard. *Vin. Bastard*, P. 6.

If a bastard dieth intestate, without wife or issue, the king is entitled to the personalty (7); and the ordinary of course grants administration to the patentee or grantee of the crown. *Jones* v. *Goodchild.* 3 *P. Will.* 33. (8)

IV. *Punishment of the mother and reputed father of a bastard child.* [132]

1. Besides the punishments to be inflicted by the ecclesiastical jurisdiction (*w*) it is enacted by the 18 *El. c.* 3. and 3 *C.* 1. *c.* 4. Corporal and pecuniary punishments.

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the latter should give the child that name; for illegitimate children as often go by the name of the mother as by that of the putative father, till, or unless, a new name of reputation is acquired. *Ibid.* and *page* 116.

(*v*) It was ruled that George Shelly acquired at the age of six years, a name by reputation as the son of George Shelly. 1 *Bac. Ab.* 309.

(7) Subject to his debts. *Megit* v. *Johnson*, *Dougl.* 542.

(8) But it is usual for the crown to grant the administration to some relation of the bastard's father or mother, reserving one-tenth or other small proportion of it. 1 *Wood.* 398. If a bastard purchase land, and die seised thereof without issue and intestate, the land escheats to the lord of the fee. *Co. Lit.* 244. *Bract. l.* 2. *c.* 7. The rule that a bastard was not to be admitted into holy orders, unless the king granted dispensation (*Hobart*, 147.), and that he might then be refused by the bishop, if presented to a church (*Fortesc.* 40. 5 *Rep.* 58.) seems obsolete. (1 *Bl. Com.* by *Christian*, 459.) But equity will not supply a surrender of a copyhold to a natural, as it will to a legitimate child. *Preced. Chan.* 475. By 55 *G.* 3. *c.* 192. a devise of copyhold is now effectual without surrender in lifetime to the uses of the will: nor is the consideration of 'natural affection' in a covenant sufficient to raise an use to a bastard, if the estate remain in the father, though an use may be declared to a bastard *in esse*, if the estate be transferred to a third person. *Hargr. Co. Lit.* 123. *a.* As to marriages of, and devises to bastards, see *infra*, Marriage, and Wills, III. 12. *note.*

(*w*) That the same matter is cognisable before the spiritual and temporal judge, see *Gibs. Cod.* 1032. The words of lord *Coke* in *Caudry's* case are, "the ecclesiastical law and the temporal have several proceedings, and to several ends; the one being temporal to inflict punishment upon the body, lands, or goods; the other spiritual

§ 15. [that two justices may take order for the punishment of the mother and reputed father; but what that punishment shall be is not therein ascertained, though the cotemporary exposition was that a corporal punishment was intended. *Dalt. Just. c.* 11. 4 *Bla. Com.* 65.]

[The punishment inflicted by 7 *J.* 1. *c.* 4. § 7. on women having bastards, is repealed by 50 *G.* 3. *c.* 51. § 1. And by the same act it is enacted, that when a woman shall have a bastard child which may be chargeable to the parish, two justices before whom she may be brought may commit her to the house of correction for not exceeding 12 calendar months or less than six weeks. (§ 2.) Two justices, at any petty session for the division in which such parish is situated, upon their own knowledge, or on a certificate, duly authenticated from the keeper of the house of correction in which such woman shall have been confined for not less than six weeks, of her good behaviour, and of the expectation of her reformation, by warrant under hand and seal, may order such woman at the time in the warrant limited to be discharged. (*Id.* § 3.) Nothing herein shall authorize any justices to commit any such woman to the house of correction until she has been delivered for one calendar month. (*Id.* § 4.)]

[133] And by the 13 & 14 *C.* 2. *c.* 12. § 19. Whereas the putative fathers and lewd mothers of bastard children run away out of the parish, and sometimes out of the county, and leave the said bastard children upon the charge of the parish where they are born, although such putative father and mother have estates sufficient to discharge such parish; it is enacted, that it shall be lawful for the churchwardens and overseers of the poor to take and seize so much of the goods, and receive so much of the annual rents or profits of the lands of such putative father or lewd mother, as shall be ordered by two justices of the peace, towards the discharge of the parish, to be confirmed at the sessions, for the bringing up and providing for such bastard child: and thereupon it shall be lawful for the sessions to make an order for the churchwardens or overseers of the poor of such parish, to dispose of the goods by sale or otherwise, or so much of them for the purposes aforesaid as the court shall think fit, and to receive the rents and profits, or so much of them as shall be ordered by the sessions as aforesaid, of his or her lands.

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pro salute animæ; the one to punish the outward man, the other to reform the inward. Then both these distinct and several jurisdictions consist and stand well together, and do join in this to have the whole man inwardly and outwardly reformed." 5 *Rep.* V. *b.* [and see *ante*, Preface, xlv. *note* (9.)] This rule is said not to hold in capital crimes, because felonies are not examinable in the ecclesiastical courts; but they may build a sentence of deprivation upon a conviction at law, *Cro. Jac.* 430., and are bound by it. *Hob.* 121.

[By 49 *G.* 3. *c.* 68. § 6. so much of 6 *G.* 2. *c.* 31. (viz. *comm. semb.* § 1, 2, 3.) as authorizes justices to commit reputed fathers before the birth of the bastard shall be repealed, and by (§ 1.) the person adjudged to be the reputed father shall be chargeable with payment of the reasonable charges incident to the birth, and of all costs of his own apprehension and order of filiation, which shall not exceed 10*l.*, to be ascertained on oath before the quarter sessions making such order of filiation. And (by § 2.) if a single woman declare herself with child, and that such child is likely to be born a bastard, and to be chargeable to any parish or extra parochial place, and shall, in an examination to be taken in writing on oath before any justice of any county or place wherein such parish, &c. shall lie, charge any person with having gotten her with child; such justice, on application made by any substantial householder of such extra-parochial place, or the overseer of the poor of such parish, may issue out his warrant for the apprehension of the person so charged, and for bringing him before such justice or any other justice of such county or place, and such justice shall commit such person to the common gaol or house of correction of the county or place, unless he give security to indemnify such parish or place (9), or enter into a re-

(9) This security is procured either by an order of filiation and maintenance, made by two justices under 18 *El. c.* 3. or by a bond from the reputed father to the overseers of the parish where the child was born, who are bound to provide necessaries for it without an order of justices. *Hayes* v. *Bryant*, 1 *H. Bla.* 253. See on this subject, *Doug.* 7. 3 *ed.* and *Burn's Justice*, by *Chetwynd*, tit. *Bastard.*

Custody of legitimate and illegitimate children: — The father of an infant legitimate child is entitled to its custody, though within the age of nurture, if the court see no ground to impute to him any motive injurious to its health or liberty (*Rex* v. *De Manderille*, 5 *East*, 221.); but this power of the father is subject to the control of the Court of Chancery, which exercises the jurisdiction of the king, whom it represents as *parens patriæ.* See the cases collected, 2 *Swanst. Rep.* 537. *note* (*b*). The Court of King's Bench has no such delegated jurisdiction as to guardianship: it can only interpose on *habeas corpus* as to the liberty of the party (*Villareal* v. *Mellish*, 2 *Swanst. Rep.* 537, 538. and *note*); and the Court of Chancery will restrain the father from removing his child, or doing any act towards removing it out of the jurisdiction: so it has refused the custody of a child to its mother who has withdrawn herself from her husband (*De Mandeville's case*, 10 *Ves.* 52.), and has appointed a guardian, and ordered a proper allowance for maintenance of infants ill-treated by their father (*Whitfield* v. *Hales*, 12 *Vesey*, 492.); for it acts for the benefit of the infant, without any regard to the prayer of the petitioner. 10 *Ves.* 59. But with regard to an *illegitimate* child, when a peaceable possession by the mother has been interrupted by the force or fraud of the father, the courts of law will interfere by *habeas corpus* to restore the child to the mother. *Rex* v. *Soper*, 5 *T. R.*

cognizance, with sufficient surety, to appear at the next general or quarter sessions for such county or place, to abide and perform such order as shall then be made in pursuance of 18 *El. c.* 3. unless one such justice shall have certified in writing under his hand to such sessions that it hath been proved by oath of one witness that such single woman has not been delivered, or had been delivered within one month only previous to the day on which such sessions shall be holden, or unless two justices for such county or place shall have certified under their hands to the next; or where such woman has not been delivered as aforesaid, then to the next subsequent sessions, that an order of filiation had been already made, or that such order was not requisite on account of the death of such child, or other good reason, in each of which cases such justices at such sessions may respite such recognizance to the next sessions without requiring personal attendance of the putative father so bound, or that of his surety, or in either of such two last mentioned cases they may wholly discharge such recognizance.

No justice of peace shall send for any woman in order to examine her concerning her pregnancy, or compel any woman to answer questions concerning the same before she has been delivered and one month after. 6 *G.* 2. *c.* 31. § 4. See *Burn's Justice* by *Chetwynd*, tit. *Bastard.*]

[134] Death. 2. By the 21 *J. c.* 27. It was enacted, that if any woman be delivered of any issue of her body, male or female, which

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278. *Rex* v. *Mosley*, 5 *East. Rep.* 224. *note.* So, though it did not appear probable that the child would be brought up so advantageously under the mother's, as the father's care, *ex parte Knee*, 1 *N. R.* 148. In *Rex* v. *Hopkins and wife*, 7 *East.* 579. a bastard child within the age of nurture was returned to the mother, who had been twice dispossessed of it by the father, once by fraud, and at another time by violence; the Court of King's Bench saying, that they did not meddle with the question of guardianship, but restored it to the same quiet custody in which it was before the transactions complained of happened. In the above cases, the children were within the age of nurture, or seven years old, and were taken from the mothers by force or fraud, except in *Knee's* case, where these facts did not appear. Whether the courts of law would take a bastard child out of the originally peaceable custody of the putative father, is another question; on which Lord Kenyon has said, that when the father has the custody fairly, he did not know that the court would interfere to take it from him. *5 East. Rep.* 224. *note.* On this case it is observed in 4 *Taunt.* 507. *per Shepherd S. arguendo,* that that is because any occasion to take it from him, viz. to prevent cruelty or brutality, or for the general interests of humanity, had not arisen. In *Strangeways* v. *Robinson*, 4 *Taunt.* 498. the great point, whether, *after* a bastard is past the age of nurture, there taken to be seven years of age, any father soever can claim its custody from the mother, was most ably discussed (*id.* 506, 507.), but was not decided. *Id.* 510.

being born alive should by the laws of this realm be a bastard, and that she endeavoured privately, either by drowning or secret burying thereof or any other way, either by herself or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed; in every such case, the said mother so offending shall suffer death as in case of murder, except such mother can make proof by one witness at the least, that the child (whose death was by her so intended to be concealed) was born dead. (*x*).

[But now by 43 *Geo.* 3. *c.* 58. § 3. the 21 *J.* 1. *c.* 27. and 6 *A. Ir. c.* 4. are repealed, and the trials in England and Ireland of women charged with the murder of any issue of their bodies, male or female, which being born alive would by law be bastards, shall proceed by like rules of evidence and presumption as in other trials for murder; and by § 4. the jury which acquit of such murder, may, if it so appears in evidence, find that the prisoner was delivered of issue, which if born alive would have been bastard, and that she did by secret burial or otherwise endeavour to conceal the birth thereof, and thereupon the court may order such prisoner to be committed to the common gaol or house of correction for not exceeding two years.]

If a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly that it kills her, this is murder; for it was not given to cure her of a disease, but unlawfully to destroy her child within her; and therefore he that gives her a potion to this end, must take the hazard, and if it kills the mother, it is murder. 1 *Hale's Hist. Pl. Crown*, 429, 430.

If a woman be quick or great with child, if she take, or another give her any potion to make an abortion; or if a man strike her, whereby the child within her is killed; though it be a great crime, yet it is not murder nor manslaughter by the law of England, because it is not yet *in rerum naturæ*, nor can it legally be known whether it were killed or not. So it is, if after such child were born alive, and after die of the stroke given to the [135]
mother, this is not homicide. 1 *H. H.* 433.

[But now by 43 *Geo.* 3. *c.* 58. § 1. Every person in England or Ireland who shall wilfully, maliciously, and unlawfully administer, or cause to be administered to, or taken by such subjects, any deadly poison or other noxious or destructive substance or thing, with intent to murder, or thereby to cause the miscarriage of any woman then quick with child, shall, with his aiders and

(*x*) For the construction of this severe act, see 2 *Haw.* 438. Presumptive evidence was usually required that the child was born alive. 4 *Bl. Com.* 198. If the woman confessed herself with child beforehand, she was not within the act. *Haw. ibid.*

abettors knowing of and privy to such offence, be felon, and suffer death without benefit of clergy.

And by § 2. Every person who shall wilfully and maliciously administer or cause to be administered to or taken by any woman any medicines, drug, or other substance or thing, or shall use or employ or cause to be used, &c. any instrument or other means with intent to procure the miscarriage of any woman not being proved to be quick with child at the time when the same were administered or employed, then they and their counsellors, aiders, and abetters, knowing of and privy to such offence, shall be deemed felons, and shall be punished by fine and imprisonment, set in the pillory, publicly or privately whipped, or be transported for any term not exceeding 14 years, in the discretion of the court; but the punishment of the pillory is abolished in all cases, except perjury or subornation thereof, and fine or imprisonment or both may be inflicted instead. 56 *G.* 3. *c.* 138. § 1, 2. See on the construction of 43 *G.* 3. *c.* 58. 3 *Camp. N. P. Rep.* 74—76.]

But if a man procure a woman with child to destroy her infant when born, and the child is born, and the woman in pursuance of that procurement kill the infant; this is murder in the mother, and the procurer is accessary. 1 *H. H.* 433.

Beadle. See Vestry.

Bells.

BY a constitution of archbishop *Winchelsea*; the parishioners shall find, at their own expence, bells with ropes.

Can. 88. The churchwardens or questmen, and their assistants, shall not suffer the bells to be rung superstitiously upon holidays or eves abrogated by the book of common prayer, nor at any other times, without good cause to be allowed by the minister of the place, and by themselves.

Can. 111. The churchwardens shall present all persons, who by untimely ringing of bells do hinder the minister or preacher.

Can. 15. Upon Wednesdays and Fridays weekly, the minister at the accustomed hours of service, shall resort to the church or chapel; and warning being given to the people by tolling of a bell, shall say the litany.

Can. 67. When any is passing out of this life a bell shall be tolled, and the minister shall not then slack to do his last duty. And after the party's death (if it so fall out), there shall be rung no more but one short peal, and one other before the burial, and one other after the burial.

Benedictines. See Monasteries.

Benefice.

See Advowson, Glebe Lands.

THE term *benefice* comes to us from the old Romans, who using to distribute part of the lands they had conquered on the frontiers of the empire to their soldiers, those who enjoyed such rewards were called *beneficiarii*, and the lands themselves *beneficia*. Hence doubtless came the word *benefice* to be applied to church livings; for besides that the ecclesiastics held for life, like the soldiers, the riches of the church arose from the beneficence of princes. And these *beneficia* were not given by the Romans merely as a recompence for what was past, but also as an encouragement for future service. *Godolph.* 200. (*y*)

In order to be legally entitled to a benefice, the several following particulars are considerable:

I. *Presentation.*
II. *Examination.*
III. *Refusal.*
IV. *Admission.*
V. *Institution, or collation.*
VI. *Induction.*
VII. *Requisites after induction.*

I. *Presentation.*

1. Presentation, nomination, and collation, are sometimes used **Presentation, what.** (1)

(*y*) The word *benefice* comes rather from the feudal law, in which it signifies a portion of land granted for a limited time by a lord to his vassal for *maintenance*. When this became hereditary, it was called a feud. Thus a benefice is sometimes opposed to an inheritance, as a feud is to allodial property; but it is now used almost exclusively to denote an ecclesiastical preferment or living. See *Calv. Lex. Wats. Incumb.* 1. *Spelman and Cowell in verb. Cowp.* 431. The " Beneficuum ad Ærarium," mentioned by Cicero *pro Archia.* 5. and elsewhere, was merely an enrolment at the Treasury of the names of persons of distinguished merit, recommended by the provincial magistrates as worthy of serving the state. *Ernesti Clavis Cicer. in verbo.*

(1) Presentation is the offering a clerk by the patron or proprietor of an advowson to the ordinary. This may be done either by word or by writing: and if it be writing it is no deed; for the presentation is of the clerk, and the direction to the bishop, so that this writing is in the nature of a letter to the bishop. 1 *Inst.* 120 *a.* *Clarke* v. *Prym and Heath*, 1 *Siderf. Rep.* 426. As to whether presentation must be in writing since 29 *C.* 2. *c.* 3. § 4. see *infra*, 149. and *note.*

in law for the same thing: and yet they are commonly distinguished: for presentation is an offering of the clerk to the ordinary; and nomination may be the offering of a clerk to him that may and ought to present him to the ordinary, by reason of a grant made by him that hath the power of presenting, obliging him thereto: and collation is the giving of the church to the clerk, and is that act by which the ordinary doth admit and institute a clerk to a church or benefice of his own gift, in which case there is no presentation. *Wats. c.* 15. *Vide* **Donation.** (2)

For it is to be observed, that the right of nomination may be in one person, and the right of presentation in another. And this is, where he who was seised of the advowson doth grant unto another and his heirs, that as often as the church becomes void, the grantee and his heirs shall nominate to the grantor and his heirs; who shall be bound to present accordingly. In which case, it was agreed by the whole court in the case of *Shirley* and *Underhill*, *M.* 16. *Ja.* that the nomination is the substance of the advowson, and the presentation no more than a ministerial interest; and that if the presentor shall present without nomination, or the nominator present in his own person, each shall have his *quare impedit*, for the security of their respective rights. And if the nominator neglect to appoint his clerk, till lapse incurs, and then the patron presents before the bishop collates, the bishop is bound to admit his clerk. *Gibs.* 794. *Mo.* 894. 3 *Ves.* 80. (z)

Who may present.

[With respect to the persons capable of exercising the right of presentation, all those who are sole, seised in fee, in tail, or for life, or possessed of a term for years of a manor to which an advowson is appendant, or of an advowson in gross, may present to the church.] (3)

Who are disabled from presenting.

[Papists. See **Popery**, XXX.

None but natural born subjects can exercise this right; and therefore if an alien purchases an advowson, and the church becomes vacant, the king shall have the presentation.

Where a person seized of an advowson is outlawed, and the church becomes vacant while the outlawry is in force, such person is disabled from presenting, and the avoidance is forfeited to the crown. *Wats.* 106.

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(2) As to what preferments are presentative, see *Com. Dig.* tit. *Eglise* (H 1.)

(z) *Dy.* 48. *a.* 17 *Vin. Ab.* 315. *pl.* 5. If the person presenting object to the nominee on the ground of immorality, that must be tried by a jury. 3 *T. Rep.* 646.

(3) See in general as to persons who may present, *Com. Dig.* tit. *Eglise* (H 2.)

A lunatic cannot present to a church, nor can his committee, for where a lunatic is seised of an advowson, the Lord Chancellor, by virtue of the general authority delegated to him, presents whatever the value of it may be; generally, however, giving it to one of the family. This right, says Dr. *Wooddeson*, was first asserted by Lord *Talbot*, whose example has been followed by all his successors. 1 *Wood. Lect.* 409.]

2. Presentation must be to a void benefice. Thus in the case of *Owen* and *Stainoe*, *E.* 34 *Car.* 2. *O.* moved for a mandamus to admit him a prebendary of St. David's, and set forth a custom, that they used to chuse a supernumerary (all the places being full), who is admitted upon the death of the next prebendary; and says, that he was chosen a supernumerary in such a year, and that one of the prebendaries died, and that *S.* was admitted: but the court refused a mandamus, and held the custom to be void, and foolish; for that there cannot be an election but to a void place. *Skin.* 45. (4) Must be to a void benefice.

3. Guardian by nurture, or in socage of a manor whereunto an advowson is appendant, shall not present to the church, because he can take nothing for the presentation for which he may account to the heir; and therefore the heir in that case shall present, of what age soever. 1 *Inst.* 89. (*a*) 3 *Inst.* 156. [138] By an infant.

And of this opinion was the late lord chancellor King, in a cause in the court of chancery, in the year 1732; who said, that if the infant were but a year old or younger, they ought to put a pen in his hand, and guide it to sign the presentation. *Wats. c.* 13. 2 *Abr. Cas. Eq.* 518. *Arthington* and *Coverley*. (*a*)

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(4) Presentation must be to a void benefice; but a grant of the next presentation, after a church is actually fallen vacant, is void, as tending to simony, [and not because it is become a chose in action; *sed. qu.*] (3 *Bur.* 1512.) though a grant of the advowson itself, under such circumstances, is good, unless it be a corrupt purchase. *Ib.* 1510. and the erratum to vol. 5. See also Advowson, 5. (2) [If on presentation the church be full, the turn is served, though the presentation be afterwards avoided. See *Com. Dig.* tit. *Esglise* (H. 4.) As to presentation in turn, see *id.* (H. 3.) A church is full as against a *common person* by admission and institution before induction, and therefore after institution the rightful patron cannot present, but ought to have his *quare impedit*. See the cases *Com. Dig.* tit. *Esglise*, (M.) So by admission, institution, and induction, the church is full against the king, who cannot present another, though he has right, but ought to have his *quare impedit*. *Ibid.* But where this is an unlawful presentation by the king, or collation by a bishop, under a mistaken title, by lapse, &c. the patron may, notwithstanding, present without a *quare impedit*. *Ibid.* citing *id.* (H.) 14. and 6 *Co.* 29. *b.* *Holland* v. *Shelley*, *Hobart*, 302.]

(*a*) See however, in [*Shoplane* v. *Boydler*], *Cro. Ja.* 99. the opinion of one judge, that if the heir be within age, the guardian shall present.

Upon the same reason subsists the case of a patron becoming bankrupt. The commissioners may sell the advowson; but if the church be void at the time of the sale, the vendee shall not present to the void turn, but the bankrupt himself, because the void turn of a church is not *valuable*. *Gibs.* 794.

By coparceners, jointenants, and tenants in common.

4. If the right of presentation is in coparceners, and they agree in the same person, they are to join in the act of presenting; otherwise, the eldest shall have the preference, and afterwards the rest in their turns: but where the right is in jointenants or tenants in common, and there hath been no composition in writing to present by turns, they must of necessity join in the presentation; for if they present singly, the bishop may refuse the clerk, and present on lapse. 1 *Inst.* 186. *Gibs.* 794. (*b*)

By executors.

5. If one be seised of an advowson in fee, and the church doth become void, the void turn is a chattel; and if the patron dieth before he doth present, the avoidance doth not go to his heir, but
[139] to his executor as a chattel real. *Wats. c.* 9. (*c*)

But if the incumbent of a church be also seised in fee of the advowson of the same church, and dieth; his heir, not his executors, shall present: for although the advowson doth not descend to the heir till after the death of the ancestor, and by his death the church is become void, so that the avoidance may be said in this case to be severed from the advowson before it descend to the heir, and to be vested in the executor; yet both the avoidance and descent to the heir happening at the same instant, the title of the heir shall be preferred as the more ancient and worthy. *Wats. c.* 9. (*d*)

If the testator do present, and (his clerk not being admitted before his death) then his executors do present their clerk; the

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Mr. Hargrave has observed, that though this decision may remove all doubts about the legal right of an infant of the most tender age to present, still it remains to be seen whether the want of discretion would induce a court of equity to control the exercise, when a presentation was obtained from an infant without concurrence of the guardian. 1 *Inst.* 89. *a. n.* 1. On the same principle stated by Dr. Burn, where testator devised his manors, advowsons, &c. to trustees to pay his son an annuity of 1000*l.* for life, and the rest of the *profits* to be laid out in land during his son's life, and then settled, it was holden, that the son had a right to present to a living when vacant, not under the devise, but as heir at law, it being a fruit undisposed of. *Amb.* 165. *Sherrard* v. *Lord Harborough.* And see *Kenney* v. *Langham, Ca. temp. Talb.* 143.

(*b*) See [illegible], 8.

(*c*) *Co. Lit.* 388. *a.* 4 *Leon.* 109. *F. N. B.* 34. *a.* [*Smith* v. *Cholmley, Dyer*, 136 *a.*] *scil.* in presentative benefices; for the void turn of a donative descends to the heir. [*Repington* v. *Gov. of Tamworth School and Collins*]. 2 *Wils.* 150.

(*d*) *Holt* v. *Bishop of Winchester*, 3 *Lev.* 47.

ordinary is at his election, which clerk he will receive. *Wats.* c. 9. (*e*)

But in the case of a bishop; the void turn of a church, the advowson whereof belongeth unto him in the right of his bishopric, by his death doth not go to his executor; but when the temporalties of the bishopric are seised into the king's hands, the king shall present. 2 *Roll's Abr.* 345.

So if the parson of a church ought to present to a vicarage; if the vicarage becometh void during the vacancy of the parsonage, the patron of the parsonage, and not the executor of the deceased parson, shall present. 2 *Roll's Abr.* 346.

6. If a feme covert hath title to present, she cannot present alone, but the presentation must be by husband and wife; and that, in both their names, and not only by the husband in right of himself and his wife. And although the right of patronage in the wife descends to her heir, yet the right of presenting during life belongs to the husband, who is tenant by curtesy. *Gibs.* 794. *Wats.* c. 9. (*g*) By the husband in right of his wife.

7. If a man that is seised of an advowson takes a wife, and dieth; the heir shall have two presentments, and the wife the third; that is to say, the wife may in a proper action recover the third presentation as her dower, or it may be assigned to her for dower. *Wats.* c. 9. (*h*) [140] By tenant in dower.

8. Although in a mortgage in fee of a manor to which an advowson is appendant, the legal right of presentation is vested in the mortgagee; yet a court of equity will interrupt that presentation, and compel the ordinary to institute the clerk of the mortgagor any time before fore-closure, it not being any part of the profits of the estate. *Str.* 403. (*i*) By the mortgagee.

But otherwise it is, where the advowson itself only is mortgaged; for in that case the mortgagee can have no other satisfaction but by presenting. 2 *P. Will.* 404. (*k*)

(*e*) 1 *Leon.* 205. But per *Windham* J. The bishop, in this case, is not obliged to admit any other clerk than he who was first presented, for the presentment of the testator is not countermanded by his death. *Savile*, 95. And the executor shall have *qu. impedit* for a disturbance to the testator. *Ib.* 118.

(*g*) See Watson, 10. (*h*) *Ib.* 11. (*i*) *Ib.* 9.

(*k*) The case alluded to in 2 *P. Williams*, 404. does not establish any such doctrine. The court gave no judgment on that point, but the reporter merely adds, that it seemed to incline to the opinion that a mortgagee under the circumstances of that case would have a right to present. The bill was dismissed, because it was brought seven months after institution. The case however of *Mackenzie* and *Robinson*, 3 *Atkins*, 559. establishes the right to be in the mortgagor. Vide Watson, 9. "It is only said," (the late Mr. Serj. *Hill* has observed,) "the court inclined to this opinion: and it is not so as I apprehend; for, if it were, the mortgagee would have something more than his

[By tenants by statute merchant. [See Advowson, 11. *a*.

By bankrupts.] See Advowson, 11. *b*.]

By the king during the vacancy of a bishopric. 9. The king is patron paramount of all the benefices in England. In virtue of which, the right and care of filling all such churches as are not regularly filled by other patrons, belongs to the crown; whether it happen through the neglect of others (as in the case of lapse), or through incapacity to present, as if the patron be attainted, or outlawed, or an alien, or have been guilty of simony, or the like. *Gibs.* 763.

Upon which ground, the king hath right to present to all dignities and benefices of the advowson of archbishoprics and bishoprics during the vacation of the respective sees. (5) Not only to such as shall become void after the seizure of the temporalties, but to all such as shall become void after the death of the bishop, though before actual seizure. And because it is a maxim in law, that the church is not full against the king, till induction (6); therefore though the bishop hath collated, or hath presented, and the clerk is instituted upon that presentation, yet will not such collation or institution avail the clerk, but the right of presenting devolves to the king. *Gibs.* 763. *Wats. c.* 9. (*l*)

And it is said, that this privilege which the king hath of presenting by reason of temporalties of a bishopric being in his hands shall be extended unto such preferments, to which the bishop of common right might present, though by his composition he hath transferred his power unto others. And therefore when the temporalties of the archbishopric of York are in [141] the king's hands, the king shall present to the deanry of York, although by composition betwixt the archbishop and the chapter there, the chapter are to elect him: and this, because the patronage thereof *de jure* doth belong to the archbishop, and his composition cannot bind the king, who comes in paramount, as supreme patron: for of the whole bishopric the king is supreme patron, although it be dismembered into divers branches, as deans, and other dignities; and of ancient time all the bishoprics were of the king's gift, but afterwards the king gave leave to the chapters to elect; yet the patronage notwithstanding remains in the king. *Wats. c.* 9. 2 *Roll's Abr.* 343.

By the king on promotion to a bishopric. [See Bishops, II. 20.] 10. Upon promotion of any person to a bishopric, the king hath a right to present to such benefices or dignities, as the person was possessed of before such promotion; though the ad-

principal and interest; which in no case he ought, or will in equity be allowed to have." Serj. *Hill's* MSS. Notes.

(5) See *Com. Dig.* tit. *Eglise.* (H 6.) (6) *Id.* (M.)

(*l*) *Co. Lit.* 388. *a.*

vowson belongeth to a common person. (7) This right of presenting upon promotion by the king, as making the avoidance which would not otherwise happen, did spring from the practice of the popes, and is now an uncontested right of the crown; and hath been established not only by long practice, but by many judgments upon full and solemn hearings; and that, whether the churches are new or old, and how often soever this happens successively by promotions to bishoprics from the same benefice or dignity: as was adjudged in the case of *St. Martin's* and *St. James's*. (*m*) Of late, the great question hath been, on supposition of the right, how far it is answered, and the turn of the crown satisfied, by the grant of a *commendam* to retain such promotions, or any part of them, together with the bishopric. Of which question the solution hath been, that by a *commendam* for life, and for the time of continuing in such a bishopric the turn of the crown is answered, and in such case the proper patron shall present, upon death, or translation; but that the right of the crown shall not be defeated by a *commendam* granted for a term of months or years, certain and limited. *Gibs.* 763. (*n*) [Nor by a statute directing that the several patrons should present in particular turns. (8)]

And this right of the crown to present upon promotion, defeats the right of any grantee, who had the next avoidance, for his right was only to the next; and the next he cannot have, and therefore can have none. *Gibs.* 758. 763. (*o*) [112]

But by law in Ireland, no person can accept a bishopric there, until he hath resigned all the preferments which he hath

(7) See *Com. Dig.* tit. *Esglise.* (H 6.)

(*m*) See [*Wentworth* v. *Wright*] *Cro. Eliz.* 527., and [*Woodley* v. *Bishop of Exeter and others*] *Cro. Jac.* 691., where the matter was doubted and argued; and [*King, &c.* v. *Bishop of London and Birch*] 3 *Lev.* 382. 1 *Raym.* 23. [2 *Salk.* 540.], where it was decided. The arguments of counsel are given at length in 1 *Shower*, 413. and 441.

(*n*) See tit. Commendam.

(8) *King* v. *Bishop of London, &c.* 2 *Salk.* 540. 1 *Ld. Raym.* 23.

(*o*) So decided *Cro. Jac.* 691., where the case put in *Co. Lit.* 379 *a.* is denied to be law; *viz.* that if one devise (in the original *grant*) the third avoidance and die, and the wife recover the third, the devisee shall have the fourth. But this case hath also been denied. 3 *Wils.* 214. *Grocers' Comp.* v. *Archb. of Canterbury*; where *De Grey* C. J. says, that prerogative presentations cannot be considered as turns; and therefore a vacancy, the fifth in fact, was decided to be a third turn with regard to the patron whose turn it was to present, it being, in truth, the third avoidance of which he could take advantage. S. C. *Black. Rep.* 770. And the same point was decided in favour of the grantee of a next avoidance, in *Calland* v. *Troward*, 2 *H. Bla.* 324., and affirmed on a writ of error in K. B. 6 *T. Rep.* 439. Again in *Dom. Proc.* 6 *T. Rep.* 778.

in England: which preferments being void before the acceptance of the bishopric, it seemeth that the king in such case shall lose the presentation.

By the king in prejudice of another's right.

11. By the 25 *Ed.* 3. *st.* 3. *c.* 1. Touching presentments to be made by the king, to a benefice of holy church, in another's right by old title; our lord the king, to the honour of God and holy church, willeth and granteth, of the assent of the parliament, that from henceforth he nor any of his heirs shall not take title to present to *any benefice in any other's right of any time of his progenitors* (9); nor that any prelate of his realm be bound to receive any such presentment to be made; nor to do thereof any execution; nor that any justice of the one place or the other, may not nor ought not to hold plea or give judgment upon any such presentment to be made: but that the said king and his heirs be for ever clearly barred of all such presentments: saving alway to him and his heirs all such presentments in another's right fallen or to fall, of all his time, and of the time to come.

And by the 25 *Ed.* 3. *st.* 3. *c.* 3. Whereas before this time, our lord the king hath taken title to present to benefices at the suggestion of many clerks, where the title hath not been true, and by such presentments and judgments thereupon given, the clerks have been received by the ordinaries of the places, against God and good faith, and in depression of them which had good and true title to the said benefices; now the king willeth and granteth, that at what time he shall make collation or presentment from henceforth to any benefice in another's right, that the title whereupon he groundeth himself shall be well examined that it be true; and at what time before judgment the title be found by good information untrue or unjust, the collation or pre-
[143] sentment thereof made shall be repealed; and the patron, or the possessor, which shall shew and prove the false title, shall have thereupon writs out of the chancery as many as to him shall be needful.

And by the 13 *R.* 2. *c.* 1. Whereas notwithstanding the last recited statute, some of the king's presentees, by favour of the ordinaries, be instituted and inducted in benefices of holy church without due process, the parties not warned nor called, and sometimes taken by false inquests favourably, and the incumbents in such manner put out; it is ordained, that the said statute be firmly holden and kept: And moreover the king, for the reverence of God and holy church, doth will and grant, that if he

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(9) This only extends to the progenitors of *Ed.* 3. as appears by the saving. 11 *H.* 4. 7. *The King* v. *Canterbury (Archbishop) and Pryst, Cro. Car.* 355. *Jones*, 338. S. C. Thus the king, and not the executor or administrator of the deceased king, shall present upon an avoidance in the time of his predecessor. *Ibid.*

present to any benefice that is full of any incumbent, the presentee of the king shall not be received by the ordinary to the benefice, till the king hath recovered his presentment by process of the law in his own court: And if any presentee of the king be otherwise received, and the incumbent put out without due process, as afore is said, the said incumbent shall begin his suit within a year after the induction of the king's presentee at the least.

(Or at any time after, at his will. 4 *H.* 4. *c.* 22.)

12. The lord chancellor, or lord keeper of the great seal for the time being, hath right to present to the benefices appertaining to the king, under a certain yearly value in the king's books. *Gibs.* 763. [*Com. Dig.* tit. *Esglise*, (H 5.)] **By the lord chancellor, of benefices in the king's gift.**

Which privilege is said to have been given to the lord chancellor, upon consideration that he had many clergymen constantly officiating under him, as those now do who are still called clerks of the chancery, and were heretofore persons in holy orders. *Johns.* 31.

The foundation of which right will be best understood by what was anciently declared in parliament upon that head, in the rolls of parliament, in the fourth year of *Ed.* 3. "Because it hath been "ordained in times whereof there is no memory, and granted "by the progenitors of our lord the king, that the chancellors "for the time being should give the benefices which belong to "the king to give, taxed *at twenty marks and under*, to the clerks "of the chancery which have long laboured in the place: which "thing hath been used from the said time, till the bishop of "Lincoln was made chancellor, who in all his time gave the said "benefices to his own clerks, and to other clerks, against the "will of our lord the king, and against the ordinance and usage "aforesaid: may it please our said lord the king and his council "to ordain, that the chancellors which shall be for the time, do "give the benefices which belong to them to give for the cause "aforesaid, to the clerks of the said place, as it hath been an- [144] "ciently used, and that this be done by election of the masters "of the chancery. Answer: Let this bill be delivered to the "king, and it liketh the council, that it is fit to command the "chancellor, that hereafter he give such benefices to the king's "clerks of the chancery, the exchequer, and of both benches, "and not to others." *Gibs.* 764.

Here we see that the privilege extended only to benefices of twenty marks or under: but now it is enlarged to all benefices *of* 20*l. or under* (1); which enlargement was probably made about the time of the new valuation taken in the reign of king Henry the eighth. *Gibs.* 764.

(1) As to a doubt of the chancellor's patronage of livings of the exact value of 20*l.* in the king's books, see *Christian's note*, 3 *Blac. Com.* 48. 15th *ed.*, which seems to establish the right to this patronage.

And it hath been declared, that where the chancellor presented to a benefice above that value, and the clerk was instituted and inducted, and another obtained a presentation from the king, the first clerk could not be removed by the law; because the presentation was under the great seal, and therefore by the king (in law), being in his name. But if the presentation had recited (as is there intimated it ought to have done), that the benefice was under the value of 20*l.* it had been void; because it would have appeared upon record in the office of first fruits, that the chancellor was deceived: or, if the mistake had appeared before induction, the king might have revoked it. *Gibs.* 764. *Hob.* 214.

But whereas it hath been said (*Wats. c.* 9.) that the king if he please may present to such livings under the value of 20*l.*; it is to be observed, that the claim of the lord chancellor or lord keeper for the time being is very ancient; and that nothing appears to have been ever determined, or moved, in a judicial way, to the diminution of that ancient right. On the contrary, there is an old writ in the register, which supposeth the right to be in him, namely, the writ *de primo beneficio ecclesiastico habendo:* by which the king requireth the chancellor to grant to a particular person the first benefice that shall fall in the gift of the crown which he will accept; and the language of the writ is, *Volumus quod idem A. ad primum beneficium ecclesiasticum (taxationem viginti marcarum excedens) vacaturum, quod ad præsentationem nostram pertinuerit, et quod duxerit acceptandum, præsentetur.* Gibs. 764.

Whether an alien may be presented.

13. It seemeth that an alien, who is a priest, may be presented to a church. 2 *Roll's Abr.* 348. (*p*)

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Thus in Dr. *Seaton's* case, *M.* 8. *Ja.*, who was born in Scotland before the union of the two realms, it was adjudged, that he was capable to be presented to a benefice in England; and so it was said it would have been, if he had been born in Flanders, Spain, or within any other kingdom, friend and in league with the kingdom of England; as the bishop of *Spalato,* who was preferred to the deanry of Windsor, and enjoyed the same. And it was said, that such incumbent might maintain any action, real, personal, or mixt, for any thing concerning the glebe or the

(*p*) 17 *Vin. Ab.* 330. The supposed reason was, that they being spiritual persons would not adhere to our enemies in time of war; but the contrary was found by practice. *Wats. c.* 20. By 13 *R.* 2. and 1 *H.* 5. *c.* 7. Frenchmen were disabled to have benefices in England. And the words of lord *Coke,* 4 *Inst.* 338. are, "Upon consideration had of the statutes 3 *R.* 2. 7 *H.* 4. 1 *H.* 5. *Rot. Par.* 6 *H.* 4. *nu.* 48. and 4 *H.* 6. *nu.* 29. if an alien or stranger born be presented to a benefice, the bishop ought not to admit him, but may lawfully refuse him, which we have added, for that the abridgments or late impressions may deceive you."

possessions of the church, as priors aliens might have done: for although he be an alien born out of the king's dominions, yet he bringeth his action, not in his own right, but in the right of his church; not in his natural, but in his politic capacity; and therefore the action will lie. *Hughes*, c. 10. (*q*)

14. It seemeth that a deacon, or even a layman, may be presented; but he must be made a priest before he can be instituted. For by the statute 13 and 14 *C.* 2. *c.* 4. § 14. none but priests only, ordained according to the form and manner by the book of common prayer prescribed, are capable to be admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever; except only the king's professor of law within the university of Oxford, who may hold the prebend of Shipton in the cathedral church of Salisbury, although he be but a layman. (*r*) A layman or a deacon.

15. For a presentee to have another benefice, although it be above the value of 8*l.* a year in the king's books, is no cause of refusal, for that is at his own peril, and the former benefice only becomes void in such case. *God.* 271. *Wats.* c. 20. (*s*) A pluralist. [146]

16. No person may present himself: and this is according to the rule of the canon law. (*t*) But the books of common law say, that though a patron cannot present himself in form, yet he may offer himself to the ordinary, and pray to be admitted; and that such admission may be good. But the more legal and regular way is, to make over the right to some other before the avoidance. And the same books do also agree, that where the right of presenting is vested in more persons than one (as in the case of joint-tenants, or joint-executors): a presentation of one of them made by the rest is good. *Gibs.* 794. (*u*) Whether a man may present himself.

(*q*) 17 *Vin.* 331. *pl.* 4, 5. *Parson's Law, ed.* 1683. *p.* 83.

(*r*) Before this act, if a layman were presented, instituted, and inducted, he was parson *de facto*. *Hob.* 149. For it was not like the presentment, &c. of a woman, which was a nullity, as her incapacity was apparent. But he might be deprived. [*Sutton's* case], *Cro. Car.* 65. But acts done by him, while parson, were binding, as marriages, leases, &c. [*Costard* v. *Windet*] *Cro. Eliz.* 775.

(*s*) That by induction to a second benefice, the first is *ipso facto* voided. See *Cro. Eliz.* 601. *Armiger* v. *Holland*. On institution to a second benefice, and before induction, the patron of the former may *present* for the plurality: but see *infra*, Plurality, *note* (1). But the bishop has no right to *collate* by lapse without notice to the patron: but induction to the second is equivalent to notice. *Wolverstan* v. *Bp. of Lincoln and another*, 2 *Wils. Rep.* 174. See as to giving notice, *infra*, 148. *note* 2.

(*t*) X. 3. 38. 26. 13 *H.* 8. 14. and 14 *H.* 8. 2. in *Heckar's* case. *Br. Ab. Corporacions*, 34.

(*u*) *Moore*, 5. *Br. Ab. Pres. al. Eq.* 45. So if two executors present a third. 3 *Bulstr.* 43. *Amb.* 101.

Whether the son next immediately after his father.

17. By a decretal epistle of pope Alexander the third, it is injoined, that if any sons of presbyters do hold churches, in which their fathers did serve as parsons or vicars, without any other intervening; they shall be removed, *whether they were born in the priesthood or not.* (v)

Whether they were born in the priesthood or not] All the children of clergymen in the times of popery were not illegitimate; for a priest might have had children before he entered into any orders, or whilst he was in the inferior orders, as ostiary, acolyth, or exorcist. For albeit the subdeacon was charged to relinquish his wife, yet those in inferior orders might retain them. And it is said, that even priests were generally married to the women they kept in those days; and though they kept it secret, for fear of deprivation, sometimes till their death, yet they often took care that sufficient evidence of their being married might appear after their death, when they were out of the reach of the canon law. *Johns.* 101.

Otho. Although the holy fathers did so abhor the possessing of ecclesiastical benefices by hereditary right, that they forbad the succession even of legitimate children into their fathers'
[147] churches; yet some, although illegitimate, do presume to invade such churches, *without any mediate successor:* we do ordain, that the prelates shall not presume immediately to institute or admit any such into the benefices which their fathers had, *in whole or in part;* and if any such have obtained the like benefices, they shall be deprived. *Athon.* 47.

Without any mediate successor] For one intervening disjoints and breaks the succession. *Athon.* 47.

In whole or in part] As to a portion, or pension. *Athon.* 47.

Peccham. Seeing it is prohibited by law, that *without a dispensation apostolical*, the sons of rectors or presbyters shall not succeed to the churches in which their fathers did serve immediately or next before; and such benefices are void, if the contrary hereunto shall be done: we do command, that the prelates shall make strict inquiry into such vacant churches, and take order therein as the law requires; taking diligent heed, that for the future they admit not any such persons to the like benefices by any title whatsoever, that a way be not surreptitiously opened contrary to right to the succession of Christ's inheritance. *Lindw.* 45.

Without a dispensation apostolical] At this day, without a dispensation from the archbishop of Canterbury, to whom the

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(v) X. 1. 17. 11. This epistle was addressed to the archbishop of Canterbury; and it is remarkable that most of the epistles on this subject are addressed to English bishops, although the rule is not observed here.

whole right of dispensation throughout both the provinces is transferred, by the statute of the 25 *H.* 8. *c.* 21. By virtue of which statute, in little more than fifty years from the time of the restoration of king Charles the second, there issued out of the faculty office no less than three hundred dispensations of this kind, for the son to succeed the father. *Gibs.* 796.

But in the case of *Stoke* and *Sykes*, *M.* 2 *Car.*, it was held by *Dodderidge* and *Jones*, two learned judges, that this canon was not received here. 1 *Stil.* 250.

And Mr. *Johnson* observes, that there is no instance since the Reformation, of any clerk deprived for succeeding his father without a dispensation. And indeed the great occasion of those canons against the son's succeeding the father, is now removed; which was to discourage the marriage of priests, as one may see by the aforesaid constitutions. *Johns.* 101.

18. Though the patron hath six months after the avoidance before the lapse incurs, yet it concerns him not to delay presenting till the six months be almost expired. For if he doth present but one week before the six months be ended, the ordinary may pretend that he hath not time to examine the clerk. Or if the ordinary refuse the clerk for inability, because he is unlearned, or the like: the patron will not have time to present anew within the sixth months, but lapse to the bishop may incur. *Wats.* *c.* 12. (*w*)

Within what time. (2) [See Lapse.]

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In the cases in which notice is to be given (3) the patron

(2) Every common person ought to present within six calendar months, *viz.* 182 days, after an avoidance, if the church becomes void either by death of the incumbent; by statute, as by acceptance of a plurality; by certificate of bishop for non-payment of tenths according to 26 *H.* 8. *c.* 3.; or by cession: for the patron ought to take notice at his peril; and if he doth not, the presentation lapses to the ordinary. See *Com. Dig.* tit. *Esglise*, (H 9.)

(*w*) But per Ld. *Hardwicke* C. The presentation to a benefice may be at any time within the six months, and the ordinary cannot take time to consider, and by that means a lapse incur, *unless it be for just cause of refusal.* And the patron may present after the six months, at any time before the ordinary collates. *Wilson* v. *Dennison*, *Amb.* 82.

(3) Thus if the avoidance is by resignation or deprivation, the six months do not commence till express notice of the avoidance is given by the ordinary to the patron; and this even though the latter was party to the suit in which he was deprived. No other than the ordinary can give the notice: so, though the bishop dies, the lapse does not incur to his successor before notice by the guardian of the spiritualties, though the temporalities are in the king's hands. So by 13 *El.* *c.* 12. § 3. if the presentee does not read the 39 articles, the church is *ipso facto* void without sentence; but by § 8. no title by lapse shall accrue till six months after notice. See *Com. Dig.* tit. *Esglise*, (H 9.) See tit. Deprivation, in *note*.

neglecting from year to year to present, lapse doth not incur to the ordinary; yet if in such case a stranger doth present, and his clerk is instituted and inducted, and not interrupted by the patron until six months (accounting from the induction) be expired, the patron is without remedy for that turn: for that though he had not notice from the ordinary of the avoidance (for which reason the ordinary can have no advantage of lapse), yet the induction of the stranger's clerk is a notorious act, of which the patron as well as the country might have taken notice. *Wats. c.* 12. (*x*)

But if a bishop doth collate his clerk, either before he gives notice of an avoidance, where notice is to be given, or at any time within the six months limited to the patron to fill his church, the patron may at any time after present his clerk: for although wrongful collation maketh such a plenarty as shall bar the lapse to the metropolitan and king, yet it is no bar to the true patron; and if the bishop doth admit the patron's clerk, the other is out *ipso facto*; and if the bishop will not admit him, the patron may as well then, as at any time before, have his remedy at law against the bishop. (*y*) And therefore if the ordinary doth collate within the patron's six months, and then the six months pass, no presentation being made by the patron; the ordinary, if he will have the benefit of a lapse, must collate of new: for the first collation being by wrong, cannot by time become rightful, and therefore doth not put the patron to his *quare impedit*; for that it was but as a provision for the time, and there ought to be a new act before it shall be a good collation. *Wats. c.* 12.

If a church or benefice be of the patronage of the king, or he
[149] hath a right of presenting thereto; he can never lose his turn to the ordinary, by his neglect of preferring his clerk thereto. And in case the king doth not present, all that the ordinary can do, is to sequester the profits of the church, and appoint a clerk to serve the cure. *Wats. c.* 12. (*z*)

Also a donative remaining void never goes in lapse; but the ordinary may compel the patron to fill the same, by ecclesiastical censures. *Wats. c.* 12. Unless it hath been augmented by the governors of queen Anne's bounty; for then it shall lapse in like manner as a presentative living.

Whether it may be by word.

19. It is said, generally, in all the books, that presentation may be made either by word (4) or by writing. If it be by word,

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(*x*) [*Servein* v. *Bp. of London*] *Noy*, 65. *Hob.* 318.

(*y*) *See* Advowson, 8.

(*z*) 2 *Inst.* 273. 14 *H.* 7. 21. *Br. Q. J.* 90.

(4) 1 *Inst.* 120. *a.* 1 *Sid.* 426. 1 *Brownl.* 162. *Moor.* 874. *Johnes* v. *Lawrence*, *Cro. Jac.* 248. The *usual* way to make a presentation by

the patron must declare in the presence of the ordinary: if by writing, it is no deed, but is in the nature of a letter missive to the bishop. 1 *Inst.* 120. 2 *Roll's Abr.* 353.

But where a corporation aggregate of many doth present, it must be under their common seal. *Gibs.* 794.

And since the statute of frauds and perjuries at least (29 *C.* 2. *c.* 3. § 4.), it is necessary that all presentation shall be in writing. (5)

[Dr. *Burn* cites a stamp act (now repealed) to shew that it is thereby implied that presentations shall be in writing, and not otherwise. The words of *that* act, when in force, merely imposed a duty on *every skin*, &c. on which any presentation, &c. *was written*: But now by 55 *G.* 3. *c.* 184. *Sched. Part the First*, tits. *Donation, Presentation, Collation*, different stamp duties are imposed in the following general terms: *on every*

DONATION by H. M. his heirs or successors, or by any other patron,

Of any ecclesiastical benefice, dignity or promotion in England, of the yearly value of 10*l.* or upwards in the king's books - - -	£ 20	0	0
Of any other ecclesiastical benefice, dignity or promotion whatsoever in England - - -	10	0	0

PRESENTATION by H. M. his heirs or successors, or by any other patron,

To any ecclesiastical benefice, dignity or promotion in England, of the yearly value of 10*l.* or upwards in the king's books - - - - -	20	0	0
To any other ecclesiastical benefice, dignity or promotion whatsoever in England - - -	10	0	0

(See terms of the act imposing stamp duty on COLLATION, *infra*, V. 14.) The above clauses induce the inference, that presentations are contemplated to be usually made in writing. And see note (5).]

20. And the same may be in this form: *To the most reverend father in God, R., by divine providence lord archbishop of Canterbury, primate of all England and metropolitan*: (if it be to the archbishop of York, the word [*all*] must be omitted: If to any other bishop, then thus:) Form of the presentation.

To the right reverend father in God, R., lord bishop of ——— [150]
or in his absence to his vicar-general in spirituals, or to any other

the king is by instrument under the great, privy, or duchy seals. See *Com. Dig.* tit. *Esglise*, (H. 8.) In *Rogers* v. *Holled*, 1 *Bro. Parl. Cas.* 117., it was said, *arguendo* in *Dom. Proc.*, that a presentation conferred no interest whatever.

(5) 3 *Cruise.* 17. *acc.*; but see *Atto. Gen.* v. *Brereton*, 2 *Vesey, sen.* 420. A.D. 1752. *cor. Hardwicke.*

person having, or who shall have, sufficient authority in this behalf: I Sir W. P. baronet, true and undoubted patron of the rectory of the parish church of ——— [or, *of the vicarage of* ———] *in the county of* ——— *and in your diocese of* ——— *now vacant by the death* [or *resignation*, or otherwise as the case shall be (6)] *of A. B. the last incumbent there, do present unto you C. D. clerk, master of arts, humbly requesting that you will be pleased to admit the said C. D. to the said church, and to institute and cause him to be inducted into the same, with all its rights, members, and appurtenances, and to do and execute all other things in this behalf which shall belong to your episcopal office. In witness whereof, I have hereunto set my hand and seal, the* ——— *day of* ——— *in the year* ———.

Which being made in this form, if the bishop be inhibited, or the see voided, before institution is had from the immediate bishop; yet the presentation is good to the metropolitan, or other guardian of the spiritualties. *Wats. c.* 15.

If a corporation in presenting doth mistake the name of their foundation, the presentation is void; therefore when a provost did present by the name of the provost of the queen in Oxon, whereas it should have been, *aula scholarium reginæ de Oxon.* according to the foundation; it was adjudged, that by reason of the omission of the word *scholarium*, several presentations did not make an usurpation, because the presentations were void. *M.* 8 *Ja. Dr. Ayry* v. *Sir Richard Lovelace. Wats. c.* 20. *Buls.* 91.

Whether it may be revoked, [varied, or made *de novo*. (7)]

21. Presentation, though duly made in all respects, may be *revoked*, or *varied*. As to the power of *revocation*, the [ancient] doctrine of the books seemeth to be, that none but the king can revoke; which he may do [and without notice to the ordinary] at any time before induction (8), as he may also present a second clerk; and such presentation shall be a good repeal of the first, especially if care is taken to free it of all suspicion of being obtained by fraud in deceit of the king, by making express mention of the first presentation. In like manner, if the king dies before the induction of his clerk, this is said to be a revocation in law. And the general consequence of a right to revoke in any case is, an obligation upon the bishop not to admit against such revocation upon pain of being a disturber. *Gibs.* 795. *Wats. c.* 20.

(6) A common person who presents ought to shew how the church became void, and whether by death, cession, resignation, or deprivation. *Com. Dig.* tit. *Eaglise*, (H 7.) So regularly the king's presentation ought to shew by what title he presents: but if he states a mistaken title, the presentation is void; whereas it is otherwise if he presents generally without stating by what title. *Id.* (H 8.)

(7) See *Com. Dig.* tit. *Eaglise*, (H 10.) *passim*.

(8) *Atto. Gen.* v. *Wycliffe*, 1 *Ves.* 80.

But it doth not seem to be clearly settled, that a common person also may not revoke a presentation, before admission, and institution thereupon. And in the case of *Stoke* and *Sykes*, *M. 3 Cha.*, *Dodderidge* said, that the civilians affirm, that a lay patron cannot revoke his presentation, but he may *cumulando variare*, and so the ordinary shall have election to institute which of them he will, but that a spiritual person cannot vary at all; but he said, that by the common law, without question, a patron may revoke his presentation. *Latch.* 191. 253. (9) [151]

And what is said in the books, that the king only can revoke, seemeth to intend *after institution*, the church not being full against the king until the induction; but after institution it is certain a common person cannot revoke, it being then too late, the church being full, with respect to him, by the institution.

As to the power of varying, it is agreed on all hands, that this may be done by a common person: that is, after one clerk hath been presented, he may (before admission given) present another; but with this difference from a revocation, that where a patron doth thus vary, *cumulando*, the ordinary may chuse and admit which of the clerks he pleaseth. *Gibs.* 795. *Wats. c.* 20.

But this power of varying belongs to laymen only, and not to ecclesiastical persons of any kind: because they are supposed in law to be competent judges of the sufficiency of the person, and do therefore proceed by judgment and election: and whoever elects an unfit person, is *ipso jure* deprived of the power of electing. *Gibs.* 795. *Wats. c.* 20. (*a*)

[If a common patron presents one who is instituted but dies before induction, he cannot present *de novo* (1): otherwise if a clerk without the patron's privity or consent obtains a present-

(9) In *Rogers* v. *Holled and others*, 2 *Bl. Rep.* 1039. 1 *Bro. Parl. Cas.* 117., it is held, that by common law a lay patron may revoke his presentation *at any time*; *Blackstone* J. saying, that by the principles of the common law such a presentation was certainly revocable, because it vested no right in any one, (see 149 *n.* 4.) not even in the clerk presented. For if the clerk had a right, the law would give him a remedy to recover it when invaded; but there is no species of common law action open or competent to a *clerk* to recover a presentation when obstructed, but to the patron only. But in the above case the presentation was revoked *before institution*, which was refused. In *Atto. Gen.* v. *Wycliffe*, 1 *Ves.* 80., it is held, that a subject may, *before institution*, revoke a presentation. And see *infra*.

(*a*) This distinction between laymen and ecclesiastical persons is to be found in the *Decretal* of *Gregory*, 3. 38. 24. and in *Lind.* 215. If a layman present two *judicio episcopi relinquendum est*; if a college or ecclesiastical person present two, *Qui prior est tempore jure potior esse videtur*.

(1) 9 *Co.* 132. *a*.

ation written and sealed by the latter, though instituted and inducted thereon. (2) So a bill to have a presentation to a living on the next avoidance delivered up, charging defendant with gross misconduct in obtaining it, and otherwise, while private tutor in the family, was dismissed on general demurrer, the court saying that the bishop will never institute such a clergyman. (3)

But if the king presents a clerk who dies before induction, he shall present *de novo;* for his presentation ought to have complete effect. (4)]

II. *Examination.*

Original right of examination in the bishop.

1. It is very well known, that in the settlement of this church of England, the bishops of the several dioceses had them under their own immediate care; and that they had the clergy living in a community with them, whom they sent abroad to several parts of their dioceses, as they saw occasion to employ them; but that by degrees, they found a necessity of fixing presbyters within such a compass, to attend upon the service of God [152] amongst the inhabitants; that these precincts, which are since called parishes, were at first much larger; that when lords of manors were inclined to build churches for their own conveniences, they found it necessary to make some endowments, to oblige those who officiated in their churches to a diligent attendance; that upon this, the several bishops were very well content to let those patrons have the nomination of persons to those churches, provided they were satisfied of the fitness of those persons, and that it were not deferred beyond such a limited time. So that the right of patronage is really but a limited trust; and the bishops are still in law the judges of the fitness of the persons to be employed in the several part of their dioceses. But the patrons never had the absolute disposal of their benefices upon their own terms; but if they did not present fit persons within the limited time, the care of the places did return to the bishop, who was then bound to provide for them. 1 *Still.* 309.

And by the statute of *Articuli cleri,* 9 *Ed.* 2. *st.* 1. *c.* 13. it is enacted as followeth: It is desired, that spiritual persons, whom our lord the king doth present unto benefices of the church (if the bishop will not admit them, either for lack of learning, or for other cause reasonable) may not be under the examination of lay persons in the cases aforesaid, as it is now attempted, contrary to the decrees canonical; but that they may sue unto

(2) *Grendit* v. *Baker, Yelv.* 7.
(3) *M'Namara* v. ——, 5 *Ves. jun.* 824.
(4) 9 *Co.* 132. *a.*

a spiritual judge for remedy, as right shall require. The answer: *Of the ability of a parson presented* unto a benefice of the church, *the examination belongeth to a spiritual judge; so it hath been used heretofore,* and shall be hereafter.

Of the ability of a parson presented] *De idoneitate personæ:* So that it is required by law, that the person presented be *idonea persona;* for so be the words of the king's writ, *præsentare idoneam personam.* And this *idoneitas* consisteth in divers exceptions against persons presented: 1. Concerning the person, as if he be under age, or a layman. 2. Concerning his conversation, as if he be criminous. 3. Concerning his inability to discharge his pastoral duty, as if he be unlearned, and not able to feed his flock with spiritual food. 2 *Inst.* 631.

And the examination of the ability and sufficiency of the person presented belongs to the bishop, who is the ecclesiastical judge; and in this examination he is a judge, and not a minister, and may and ought to refuse the person presented, if he be not *idonea persona.* 2 *Inst.* 631.

The examination belongeth to a spiritual judge] And yet in [153] some cases, notwithstanding this statute, *idoneitas personæ* shall be tried by the country, or else there should be a failure of justice, which the law will not suffer: as if the inability or insufficiency be alleged in a man that is dead, this case is out of the statute: for in such case the bishop cannot examine him; and consequently, though the matter be spiritual, yet shall it be tried by a jury; and the court, being assisted by learned men in that profession, may instruct the jury as well of the ecclesiastical law in that case, as they usually do of the common law. 2 *Inst.* 632.

And so it hath been used heretofore] So as this act is a declaration of the common law and custom of the realm. 2 *Inst.* 632.

Time for examination.

By a constitution of archbishop *Langton: We do injoin, that if any one be canonically presented to a church, and there be no opposition; the bishop shall not delay to admit him longer than two months, provided he be sufficient.* Lind. 138. 215.

But by *Can.* 95. Albeit by former constitutions of the church of England, *every bishop hath had* two months space *to inquire and inform himself* of the sufficiency and qualities of every minister, after he hath been presented unto him to be instituted into any benefice, yet for the avoiding of some inconveniences, we do now abridge and reduce the said two months unto twenty-eight days only. In respect of which abridgment we do ordain and appoint, that no double quarrel shall hereafter be granted out of any of the archbishop's courts, at the suit of any minister whatsoever, except he shall first take his personal oath, that the said twenty-eight days at the least are expired after he first tendered his presentation to the bishop, and that he refused to

grant him institution thereupon; or shall enter into bonds with sufficient sureties to prove the same to be true; under pain of suspension of the grantor thereof from the execution of his office for half a year *toties quoties*, to be denounced by the said archbishop, and nullity of the double quarrel aforesaid so unduly procured, to all intents and purposes whatsoever. Always provided, that within the said twenty-eight days, the bishop shall not institute any other to the prejudice of the said party before prevented, *sub pœna nullitatis.*

Every bishop hath had] The canon mentions bishops only, because institution belongeth to them of common right; but it must also be understood to extend to others, who have this right
[154] by privilege or custom, as deans, deans and chapters, and others who have peculiar jurisdictions. Concerning whom it hath been unanimously adjudged, that if the archbishop shall give institution to any peculiar belonging to any ecclesiastical person or body, it is only avoidable; because they being not free from his jurisdiction and visitation, the archbishop shall be supposed to have a concurrent jurisdiction, and in this case only to supply the defects of the inferiors, till the contrary appears. But if the archbishop grant institution to a peculiar in a lay hand, it is null and void: because he can have no jurisdiction there. *Gibs.* 804. (*b*)

To inquire and inform himself] In answer to an objection made, that the bishop ought to receive the clerk of him that comes first, otherwise he is a disturber: *Hobart* saith, the law is contrary: for as he may take competent time to examine the sufficiency and fitness of a clerk, so he may give convenient time to persons interested, to take knowledge of the avoidance (even in case of death, and where notice is to be taken, and not given) to present their clerks to it. Agreeable to what is held elsewhere, that it was a good plea for the ordinary, and no refusal of the clerk, that the ordinary having other business, commanded the clerk to come to him afterwards, to be examined; and that the clerk not returning, and the six months passing, the ordinary was well entitled to the lapse. *Gibs.* 804, 805. 3 *Leon.* 46. (*c*)

Manner of examination.

3. *Can.* 39. No bishop shall institute any to a benefice, who hath been ordained by any other bishop, *except he first shew unto him his letters of orders*; and *bring him a sufficient testimony of his former good life and behaviour*, if the bishop shall require it; and *lastly, shall appear upon due examination to be worthy of his ministry.*

Except he first shew unto him his letters of orders] And by the 13 & 14 *C.* 2. *c.* 4. No person shall be capable to be admitted

(*b*) [*Wrighton* v. *Browne*] 3 *Lev.* 212. (*c*) *Hob.* 317.

to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever, before such time as he shall be ordained priest.

And bring a sufficient testimony of his former good life and behaviour] By the ancient laws of the church, and particularly of the church of England, the four things in which the bishop was to have full satisfaction in order to institution, were age, learning, behaviour, and orders. And there is scarce any one thing which the ancient canons of the church more peremptorily forbid, than the admitting clergymen of one diocese to exercise [155] their function in another without first exhibiting the letters testimonial and commendatory of the bishop by whom they were ordained. And the constitutions of the archbishops Reynolds and Arundel shew, that the same was the known law of the English church, to wit, that none should be admitted to officiate (not so much as a chaplain, or curate) in any diocese in which he was not born or ordained, unless he bring with him his letters of orders, and letters commendatory of his diocesan. *Gibs.* 806. (5)

Notwithstanding which, in the case of *Palmes* and *The bishop of Peterborough*, *T.* 33 *El.* On a *quare impedit* brought against the bishop, the bishop pleaded that he demanded of the presentee of the plaintiff to see his letters of orders, and he would not shew them; and also he demanded of him letters missive or testimonial, testifying his ability; and because he had not his letters of orders, nor letters missive, nor made proof of them otherwise to the bishop, he desired leave of the bishop to bring them; and he gave him a week, and he went away, and came not again, and that the six months passed, and he collated by lapse. And upon demurrer, it was adjudged for the plaintiff; for that these were not causes to stay the admittance, and the clerk is not bound to shew his letters of orders or missive to the bishop, but the bishop must try him upon examination for one and other. *Cro. Eliz.* 241. (*d*)

Which most of the books take notice of as a pretty hard case, and in which perhaps the bishop's taking advantage of the lapse might be some part of the consideration. And these words of the canon (which was made not many years after) seem to have some reference or retrospect to that determination.

But it is to be observed, first, as to the letters of orders, that it was only adjudged not to be necessary to produce the very letters of orders; for they might be lost, and proof thereof might other-

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(5) *Lynd.* 139.; but where a clerk was objected to on ground of immorality, that may be tried by a jury. *Rex* v. *Marquis of Stafford*, 3 *T. R.* 648, 649.

(*d*) And per *Anderson*, the bishop may examine him upon oath, if he hath orders or not. 1 *Leon.* 230. S. C.

wise be very well made from the registry of the bishop who ordained the clerk; or else it would follow, that every clergyman
[156] whose letters of orders are lost, or consumed by fire or other accident, would be incapable to be admitted to a benefice. And as to the letters testimonial; the bishops charged, that he did not bring such letters *testifying his ability*, which the court seemeth to have understood of his ability as to learning, of which without doubt the bishop must judge upon examination; but the bishop ought to have set forth, that he did not produce letters missive or testimonial of his good life and behaviour.

And lastly shall appear, upon due examination, to be worthy of his ministry] As to the matter of learning, it hath been particularly allowed, not only by the courts of the king's bench and common pleas, but also by the high court of parliament, that the ordinary is not accountable to any temporal court, for the measures he takes, or the rules by which he proceeds, in examining and judging (only he must examine in convenient time, and refuse in convenient time): and that the clerks having been ordained (and so, presumed to be of good abilities) doth not take away or diminish the right which the statute above recited doth give to the bishop to whom the presentation is made, to examine and judge. *Gibs.* 807.

In the case of *Albany* and *The bishop of St. Asaph*, *T.* 27 *Eliz.* the want of knowledge in the Welsh tongue, was declared to be a good cause of refusal, where the service was to be performed in that language: as rendering the clerk uncapable of the cure: nor did it avail to allege, that the language might be learned, or that the part of the cure he was uncapable of might be discharged by a cure. *Gibs.* 807. (*e*)

The law is the same, if the person presented doth not understand the English tongue; for in such case the bishop may refuse him for incapacity. *Wats. c.* 20. (*g*)

Where there is a mixture of divers languages in any place, the rule of the canon law is, that the person presented do understand the several languages. *Gibs.* 807. (*h*)

III. *Refusal.*

Causes of refusal.

1. The most common and ordinary cause of refusal is want of learning.

But there are also many other causes for which a clerk presented may lawfully be refused (6); as, if he be perjured before

(*e*) *Cro. Eliz.* 119. (*g*) *Hob.* 148. (*h*) X. 1. 31. 14.

(6) All such as are sufficient causes to deprive an incumbent, are sufficient to refuse a presentee. *Specot's* case, 5 *Rep.* 57. 32 *El.* See in general as to causes of deprivation, *infra*, *Deprivation*, *note*; and of refusal, *Com. Dig.* tit. *Esglise*, (I).

a lawful judge; or if he be an heretic or schismatic; or irreligious; or (as is said in the old books) if he is a bastard, and not dispensed withal; or if he is within age; or if he or his patron be excommunicated for the space of forty days; or if he be outlawed; or guilty of forgery; or hath committed simony in the procuring of the presentment he brings, or of another presentment to a former benefice; or hath committed manslaughter, that is, if he be attainted thereof, and not pardoned; and it is said, that the ordinary may refuse a clerk upon his own knowledge for an offence committed by him, which is a good cause of refusal, although he be not convicted thereof by the law; and this shall be tried by issue, whether it be true or not: and generally, all such as are sufficient causes of deprivation, are also sufficient causes of refusal. *Wats. c.* 20. (*i*)

2. If the clerk refused be the presentee of a bishop, or other ecclesiastical patron; the ordinary is not bound to give notice of the refusal: or if he should do it, such patron can never revoke nor vary his presentations, by presenting one afterwards that is better qualified, without the ordinary's consent; the law supposing him that is a spiritual person to be capable of chusing an able clerk; and so lapse may come to him unavoidably, if the clerk first presented be justly refused. But if the clerk presented be the presentee of a lay patron, and be refused by the ordinary; the ordinary in most cases is bound to give notice to the patron of such refusal: for if in such case no notice is given, nor lapse can run, though no other clerk be presented; nor if notice be given, unless upon trial the clerk was justly refused. (*k*) But if a clerk presented be for good cause refused, and notice thereof be in due time and manner given to the patron, and no other clerk be presented in time; lapse doth run to the ordinary. *Wats. c.* 12. (7)

Notice to the patron of refusal.

In the case of *Hele* and *The bishop of Exeter*, *M.* 3 *W.*, it was said by the court; that if the ordinary refuse because he is criminous, he need not give notice of the refusal; for the crime is

(*i*) [See 2 *Inst.* 632. *Com. Dig.* tit. *Esglise*, (I).] Where the right of nominating is in *A.* and of presenting in *B.*, *B.* is to judge of the qualification of the person nominated, in the same manner as a bishop does: but, if the person presenting object to the ground of immorality, that must [might] be tried by a jury. [*Rex* v. *Marquis of Stafford*], 3 *Term Rep.* 648, 649. *Serjt. Hill's* MS. Notes

(*k*) 14 *H.* 7. 21. *Bro. Ab. Q. Imp.* 90.

(7) Notice of refusal by the bishop ought to be given to the patron himself, if he be resident in the county; and if not, a public intimation ought to be placed on the church door. Such notice ought to have been given immediately that he was presented and examined, or within such convenient speed as might be; but when the bishop is to inquire of the behaviour of the clerk, he shall have longer time. *Albany* v. *Bp. of St. Asaph*, *Cro. El.* 119.

as much in the cognizance of the patron as of the bishop; but if he refuse because illiterate, he must give notice. 2 *Salk.* 539.

And in general lord *Coke* says, if the cause of refusal be for default of learning, or that he is an heretic, schismatic, or the
[158] like, belonging to the knowledge of ecclesiastical law, there the ordinary must give notice thereof to the patron; but if the cause be temporal, as felony, or homicide, or other temporal crime, or if the disability grow by any act of parliament, or other temporal law, there no notice need to be given, unless notice be prescribed to be given thereby. 2 *Inst.* 631.

But in the case of the *King* and *The bishop of Hereford*, where the refusal was of a common drunkard and common swearer, who was presented by the king, and it was argued that in this case no notice need to be given, because *nullum tempus occurrit regi*, and no lapse could incur if he did not present again within the six months; yet the court resolved, that the plea was bad, for want of notice alleged. *Gibs.* 807. *Comyns*, 358.

At least in all cases it is fair and equitable, to give notice to the patron of the refusal, whatever the cause may be; for it is very possible that the person presented may be many ways unfit, and the patron not know it.

And it is not enough that the bishop barely give notice of his refusal, unless he also signify the cause of it. For although the bishop is judge in the examination, yet inasmuch as the proceedings of the bishop are not of record, the cause of refusal is traversable: and if it be traversed, and the party refused be living, this shall be tried by the metropolitan; and if he be dead, this shall be tried by the country. 5 *Co.* 58.

And such notice ought to be given with as much speed as conveniently may be; and therefore, where the ordinary delayed to give notice to the patron for the space of twenty-two days, it was held that the notice was insufficient, and that therefore the bishop should have no advantage by lapse. *Wats. c.* 20. (*l*)

And notice is to be given in such cases to the person of the patron, if he be within the county where the church is at the time of the giving thereof; otherwise it is to be given to him by an instrument in writing, affixed to the door of the church to which the clerk was presented; but if notice be given by such instrument as aforesaid, before the patron be inquired after, and a
[159] return made that he is not to be found within the county, such notice is not good. *Wats. c.* 20. (*m*)

When the bishop hath given notice of his refusal of a clerk, this doth not give the patron a longer time to present in, than he

(*l*) [*Albany* v. *Bishop of St. Asaph*], *Cro. Eliz.* 119, where the cause of refusal was, that the presentee could not speak Welsh, the service of the church being in that tongue, and held a good cause.

(*m*) *Dy.* 327. *b.* 3 *Leon.* 47. *Cro. Eliz.* 119.

had before. For if the church be so void, that the bishop is not bound to give the patron notice of the avoidance, the patron must present his second clerk (if he thinks his first presentation to be justly refused) within the six months, accounting from the time the avoidance happened. But if the church be void by such means, as that the six months do not run without due notice to the patron of the avoidance, and the patron doth present his clerk before the ordinary hath given him any notice thereof; if the ordinary doth refuse his clerk, and give notice of his refusal, yet the patron (as it seemeth) hath six months, accounting from the notice of the bishop's refusal, to make his second presentment in, before lapse can incur. But if the bishop had given notice of the avoidance before the patron presented, and then he refuseth the patron's clerk for just cause, and doth give notice thereof, the patron's six months are to be accounted from the first notice. *Wats. c.* 20.

If the bishop refuse a clerk for insufficiency, and the patron presents another, and the bishop admits the first, he is a disturber; for having once refused him for insufficiency, he cannot afterwards accept him. *Gibs.* 807.

Remedy for the clerk refused, by *duplex querela* in the spiritual court.

3. When the bishop doth without good cause refuse, or unduly delay to admit and institute a clerk to the church to which he is presented, the clerk may have his remedy against the bishop in the ecclesiastical court, as the patron may in the temporal court, by *quare impedit.* (*infra*, 4.) (*n*)

This remedy the clerk may have before the ordinary to whom appeals are to be made, by the way of a *duplex querela;* that is to say, if a bishop doth refuse, then before the archbishop in his court of appeals; if an archbishop doth refuse, then before the delegates.

And if the bishop doth admit the clerk, and then doth refuse to institute him; the clerk may have the same remedy against the ordinary, to inforce him to his duty: that is, the clerk presented having exhibited his presentation to the bishop, or to his vicar general (having power to institute), and being refused or unjustly delayed, and complaining to the judge of appeals thereof; [160] the judge is wont to write to the bishop in form of law, and this writing they call a *duplex querela.*

This *duplex querela* is to contain a monition to the bishop, or to his vicar general (having power to give institution) that within a certain time, as within nine, or sometimes fifteen days, he admit the party complaining; and also a citation, whereby the bishop may be cited to appear by himself or proctor at a day after, in case he doth not institute as aforesaid, to shew cause why, by reason of his neglect of doing justice, the right of institution is not devolved to the superior judge. It is also expedient, that the

(*n*) [*Wats.* 230. 2 *Inst.* 631.] See Advowson, 14.

same *duplex querela* do contain an inhibition to the bishop, and to such vicar general as aforesaid, that nothing be done by either of them pending the suit, to the prejudice of the party complaining. *Hob.* 15. *Can.* 95. in 1603.

The clerk refused, having obtained from the proper judge a *duplex querela*, is to take care that some person sufficiently learned for that purpose, do admonish the bishop to admit him and to do justice, within the time mentioned in the *duplex querela*, and also according to the contents thereof to inhibit the bishop.

If the bishop, after he is admonished to institute the presentee, shall expressly refuse to admit him; the mandatory may presently cite the bishop to appear, according to the contents of t h *duplex querela;* but if no refusal be made, the bishop being admonished as aforesaid, the clerk is first to repair to the bishop or such his vicar general as aforesaid on the third day after, if no more than nine days are mentioned in the *duplex querela*, or on the fifth day after if fifteen days be appointed therein, and to exhibit his presentation, and to require admission and justice in all respects to be done to him, and offer himself ready to subscribe the thirty-nine articles of religion, and the declaration as required by law, and to take the oaths, and to do every other thing required by law to be of him performed, in respect of his admission and institution into that benefice. And this he is to do two times more, if not received, namely, every third, or every fifth day, according to the time given in the *duplex querela*. But if he cannot come to the presence of the bishop, he is to protest his readiness to receive his admission and to subscribe as aforesaid, and to have at least two witnesses thereof.

If the bishop shall not do the clerk justice within the time limited; then, after the expiration thereof, the party presented
[161] is to take care that the bishop be cited according to the tenor of the *duplex querela*.

If the person that is to cite the bishop cannot come to his presence; he is to signify to some of the bishop's servants, that he hath a *duplex querela* at the instance of such a clerk presented to such a church, to be by him executed, and to desire that he may come to the presence of the bishop. If he may not come to the bishop's presence, so that he cannot cite him; the presentee is to stay till the day on which the bishop should appear had he been cited: at which time he is to be called; and if he appear not by himself or proctor, a citation *viis et modis* is to be decreed, which is to be executed personally if the bishop may be spoken with, and if not, then by affixing it to the outward doors of the bishop's palace, or of the house where the bishop resides, or of his cathedral church.

After the bishop is cited, whether by the first or second mandate, the person citing is to certify to the clerk or his proctor by his letters, or by subscribing upon the backside of the mandate,

the day of executing the monition to institute, and the inhibition, the several days of the presentee's asking admission, and the day of his citing the bishop; and if the bishop refused expressly to admit, that also is to be certified.

If the bishop appear not at the day, upon the petition of the presentee's proctor, the bishop being thrice called, is by the judge pronounced contumacious; and as a punishment of his contumacy, the judge doth pronounce the right of instituting the presentee to his benefice to be devolved to the superior judge, and doth decree that the clerk shall be instituted, and that he will write to the archdeacon or ordinary of the diocese where the church is, commanding him to induct him.

Then the clerk is remitted (if the proceedings be in the court of arches or audience) to the archbishop to examine him; and the archbishop, approving of him, returns him with his *fiat institutio* to the judge; who, before he institutes, is wont to require a bond of the presentee to save him harmless on that account.

But if the bishop doth appear, and doth allege some just cause why he refused the clerk; then they are to proceed to the trial of that, as in other summary causes.

If the cause alleged by the bishop be not proved, the judge pronounceth as before, for his own jurisdiction: and the bishop is to be condemned in expences; and so if he doth allege an insufficient cause, as that the church is litigious; for this he ought [162] to have tried.

If the bishop will not defend the suit, the pretended incumbent may do it, and allege that the church is full of himself; but then the judge will first pronounce sentence for his own jurisdiction; because the bishop hath alleged nothing to oppose it. But if the bishop will allow such incumbent to defend the suit in his own name, then the judge cannot decree for his own jurisdiction, until the cause is determined. *Clarke*, Querela Dupl. *Wats. c.* 21. 1 *Ought.* 237—248.

And this way of proceeding in this case against a bishop, is allowed of by the common law; and no prohibition lieth for the bishop. *Wats. c.* 12.

Which course of proceeding in the ecclesiastical court, is the most proper remedy that the clerk can use, in case he be refused by the bishop upon the account of any personal fault or defect: not only because by such course the clerk in a short time, at less charge, and less hazard of losing his living by errors (which are easily fallen into at common law), may gain institution; but also because although his patron bring his action at common law for refusing his clerk for crime or insufficiency, such cause of refusal shall be tried by a spiritual judge, to wit, if a bishop refuse, by the metropolitan of the province. *Wats. c.*21. (*o*)

(*o*) [*Specot*'s case, 3 *Leon.* 199. But this is not a proper remedy

And the ecclesiastical judge in this case, is to make certificate of his judgement to the temporal court; upon which they may proceed to sentence, in a *quare impedit* or *darrein presentment*. *Wats*. c. 21.

If the archbishop of York refuse, it is said that the cause of refusal shall be tried by himself only. *Wats*. c. 21.

But if the party in whom disability is alleged, be dead before his second examination, so as he cannot be examined; the trial of his ability or disability shall be by the country. So in a *quare impedit* against the archbishop of Canterbury, if the ability of the clerk come in question, it is said that it shall be tried by the
[163] country, and not by any inferior ordinary; and the same reason seems to be as to the archbishop of York. *Wats*. c. 21.

Remedy for the patron in the temporal court by *quare impedit*.

4. If the patron finds himself aggrieved by the ordinary's refusal of his clerk; he may have his remedy by *quare impedit* in the temporal court.

And in such case the ordinary must shew the cause of his refusal specially and directly (not only that he is a schismatic, or heretic, for instance; but the particular schismatical acts or heretical opinions that he is charged withal must be set forth). For the examination of the bishop doth not finally conclude the plaintiff: and without shewing specially, the proper court cannot inquire and resolve, whether the refusal be just or no. And if the cause of refusal be spiritual, the court shall write to the metropolitan to certify thereof; or if the cause be temporal and sufficient in law (which the temporal court shall decide) the same may be traversed, and an issue thereupon joined and tried by the country. 2 *Inst*. 631. *Specot's* case, 5 *Rep*. 58.

But in case of refusal for insufficiency in learning, it was adjudged in parliament, in the case of *The bishop of Exeter* against *Hele*, to be a good plea on the part of the bishop, that the presentee was a person *not sufficient or capable in learning to have the said church;* and there resolved, that he need not set forth in what kinds of learning, or to what degrees, he was defective. 2 *Salk*. 539. *Gibs*. 807.

IV. *Admission*.

In a larger sense, admission is sometimes used to include also institution; but more frequently, and properly, admission is taken to be, when the bishop upon examination doth approve of the presentee, as a fit person to serve the cure of the church to which he is presented [1 *Inst*. 244 *a*.]; and institution is that act by which he doth commit to him the cure thereof. *Wats*. c. 15.

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where another clerk has been instituted and *inducted*, though wrongfully; because he has then acquired a lay fee, of which the ecclesiastical court cannot deprive him, except for certain crimes. *Watson*, c. 21. *Hob*. 15.

And we find sometimes also the practice of *investiture* by the bishop, in our ecclesiastical records —— *ipsum instituit et* investivit *annulo suo;* which is frequently repeated in archbishop *Peckham*'s register (and is in use to this day in the diocese of *St. Asaph*), and is mentioned as distinct from the admission, institution, and induction. *Gibs.* 808. (8)

V. *Institution, or collation.* [164]

Difference between institution and collation.

1. There is no difference between institution and collation, as to the action itself, but this; that the bishop doth not present to such livings as are in his own gift, but immediately instituteth his clerk in much the same form as he or his chancellor institute a clerk presented by any other patron. And as the bishop collates to benefices of his own gift *jure pleno* so he doth to those which fall to him by lapse. *Johns.* 81.

Oath against simony.

2. By Can. 40. To avoid the detestable sin of simony, every archbishop, bishop, or other person having authority to admit, institute, or collate, to any spiritual or ecclesiastical function, dignity, or benefice, shall before every such admission, institution, or collation, minister to every person to be admitted, instituted, or collated, the oath against simony (which is inserted under the title **Simony**).

Oaths of allegiance and supremacy.

3. By the 1 *El. c.* 1. & 1 *W. c.* 8. § 5. Every person who shall be promoted or collated to any spiritual or ecclesiastical benefice, promotion, dignity, office, or ministry; before he shall take upon him to receive, use, exercise, supply, or occupy the same, shall take the oaths of allegiance and supremacy, before such person as shall have authority to admit him (which are inserted under the title **Oaths**).

Oath of canonical obedience.

4. Also the person to be instituted shall take the oath of canonical obedience in like manner. *Clarke, Tit.* 91.

Which oath is as followeth; "I A. B. do swear, that I will "perform true and canonical obedience to the bishop of C. and "his successors, in all things lawful and honest: So help me "God." *Gibs.* 810.

Oath of residence.

5. And if it is a vicarage he shall in like manner take the oath of personal residence in the same. *Clarke, Tit.* 91.

Which is this; "I A. B. do swear that I will be resident in "my vicarage of —— in the diocese of —— unless I shall be "otherwise dispensed withal by my diocesan: So help me God." *Gibs.* 810. (*p*)

(8) Institution by the ordinary was introduced *circa temp. R.* 1. and *John;* before which the incumbent took his church by investiture of the patron. *Seld. de Dec.* 86. 375. 383.

(*p*) By 57 Geo. 3. c. 99. § 34. No oath of residence shall be required of any vicar; [nor is a parsonage that hath a vicar endowed as a perpetual curate, and without cure of souls within that act. *Id.* § 81.] See **Residence**, 9.

And by a constitution of *Otho*; without the oath of residence, the vicar's institution shall be void. *Athon.* 24.

Subscription to the thirty-nine articles.

6. By the 13 *El.* c. 12. requiring assent and subscription to certain articles therein specified, and contained in the book of articles agreed upon in convocation in the year 1562, it is enacted, *that no person* shall be admitted to any benefice with cure, except he shall first have subscribed *the said articles* in presence of the ordinary.

[165] *To any benefice with cure*] So that sine-cures, archdeaconries, prebends, and the like, lay no obligations on any person to subscribe, by this statute. *Gib.* 808.

Except he shall first have subscribed] And the ordinary is not bound to offer the articles to the clerk to be by him subscribed, and to require him to do it; but the clerk is himself to offer to subscribe them: and in this case upon the clerk's neglect to subscribe the articles, the church remains void, as never full of such clerk, and no sentence of deprivation is necessary, by reason that he never was incumbent, but the admission and institution are void. *Wats. c.* 15. (*q*)

In presence of the ordinary] Before this statute, institution was frequently given (as inductions and instalments may be still) by proxy; as appears by innumerable instances in the ecclesiastical records. *Gibs.* 808.

Subscription to the three articles, concerning the supremacy, the common prayer, and the thirty-nine articles.

7. By *Can.* 36. No person shall, either by institution or collation, be admitted to any ecclesiastical living; except he shall first subscribe to these three articles following.

(1) "That the king's majesty, under God, is the only supreme "governor of this realm, and of all other his highness's dominions "and countries, as well in all spiritual or ecclesiastical things or "causes, as temporal; and that no foreign prince, person, prelate, "state, or potentate, hath or ought to have any jurisdiction, "power, superiority, pre-eminence or authority, ecclesiastical "or spiritual, within his majesty's said realms, dominions, and "countries."

(2) "That the book of common prayer, and of ordering of "bishops, priests, and deacons, containeth in it nothing contrary "to the word of God, and that it may lawfully be used, and that "he himself will use the form in the said book prescribed in "public prayer, and administration of the sacraments, and none "other."

(3) "That he alloweth the book of articles of religion, agreed "upon by the archbishops and bishops of both provinces, and "the whole clergy in the convocation holden at London, "A. D. 1562; and that he acknowledgeth all and every the "articles therein contained, being in number nine and thirty,

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(*q*) 1 *Anderson*, 63.

" besides the ratification, to be agreeable to the word of " God."

To these three articles whosoever will subscribe, he shall for the avoiding of all ambiguities subscribe in this order and form of words, setting down both his christian and surname, viz. " I N. N. " do willingly and *ex animo* subscribe to these three articles " above mentioned, and to all things that are contained in them." *And if any bishop shall admit any as is aforesaid, except he first have subscribed in manner and form aforesaid, he shall be suspended from giving of orders and licences to preach for the space of twelve months.* [166]

Which penalty seemeth not adequate to the offence; for this is punishing of others, rather than the bishop, for the bishop's default.

Subscription of the declaration of conformity.

8. By the 13 & 14 *C.* 2. *c.* 4. Every dean, canon, and prebendary of every cathedral or collegiate church; and every parson, vicar, curate, lecturer, and every other person in holy orders; who shall be incumbent or have possession of any deanry, canonry, prebend, parsonage, vicarage, or any other ecclesiastical dignity or promotion, or of any curate's place or lecture; shall at or before his admission to be incumbent or have possession aforesaid, subscribe the declaration or acknowledgment following, viz. " *I A. B. do declare, that I will conform to the liturgy of the " church of England, as it is now by law established.*" 13 & 14 *C.* 2. *c.* 4. *s.* 8. 12. 1 *W. sess.* 1. *c.* 8. *s.* 11. (*r*)

Which said declaration and acknowledgment shall be subscribed before the archbishop, bishop, or ordinary of the diocese [or before the vicar-general, chancellor, or commissary respectively, 15 *C.* 2. *c.* 6. § 5.]; on pain that every person failing in such subscription, shall lose and forfeit such respective promotion, and shall be utterly disabled and *ipso facto* deprived thereof; and the same shall be void, as if such person so failing were naturally dead. 13 & 14 *C.* 2. *c.* 4. § 10. (*s*)

And after such subscription made, every such parson, vicar, curate, and lecturer shall procure a certificate under the hand and seal of the respective archbishop, bishop, or ordinary of the diocese (or such their vicar-general, chancellor, or commissary as aforesaid), who shall on demand make and deliver the same to be read by him publicly in the church afterwards. 13 & 14 *C.* 2. *c.* 4. § 11.

Concerning the person instituting.

9. If the bishop admit a clerk as sufficient, he either institutes him in person, or else gives him his fiat, and sends him to his vicar-general, chancellor, or commissary, to do it for him. *Johns.* 72.

So archbishop Sancroft, when he had resolved against taking

(*r*) *Gibs.* 809. (*s*) *Vide post*, p. 181.

the oaths to king William and queen Mary, and therefore could not in reason administer them to others, did send his clerks to be instituted to his collative benefices, by the vicar-general. *Johns.* 72.

And not only by commission in particular cases, but also the general power of granting institution may be delegated by patent to chancellors or commissaries; but this hath not always been judged convenient. *Gibs.* 804. (*t*)

During the time that any diocese or inferior jurisdiction is *visited*, and inhibited by the archbishop, the right of institution belongeth to him; and when any see is *vacant*, the right belongeth also to him, or to such other as by composition, prescription, or otherwise, is guardian of the spiritualties. *Gibs.* 804.

If institution be taken from an improper hand, it may be made good by confirmation of the person from whom it ought to have been taken. Thus we find, that an institution which had been given by the bishop of St. David's, pending his suspension, was confirmed by archbishop Whitgift; as also another institution, by archbishop Abbot, which had been given by the bishop, pending a metropolitical visitation. *Gibs.* 814.

In what place.

10. It is not of necessity, that the examination, admission, or institution be made by the ordinary within the diocese in which the church is; for the jurisdiction of the ordinary, as to such matters, is not local, but follows the person of the ordinary wherever he goes. *Wats. c.* 15. (*u*)

(*t*) At the convocation in 1640 the contrary was decreed by canon XI.

(*u*) The whole matter of admission, institution, and induction, is well explained in the following passage of Sir *Simon Degge's Parson's Counsellor, Part* 1. *c.* 2.—" If the ordinary, &c. upon the examination of the clerk, find him fit in all points, as above in the first chapter is directed, then he admits him in these words, *Admitto te habilem*, *&c.* and thereupon the ordinary institutes him in these words, *Instituo te rectorem ecclesiæ parochialis de C. et habere curam animarum, et accipe curam tuam et meam.* And this the bishop may do as well out of his diocese as within it, for as to this matter, it is not local, but follows the person of the bishop whithersoever he goes. When the bishop has instituted the clerk, the ordinary, &c. makes a mandate under seal to the archdeacon of the place, or to such other clergyman as he pleases, to induct the clerk, and it may be made by the dean and chapter, but not by the patron; for though by the institution the church is full against all persons, save the king, yet he is not complete parson till induction: for by the institution he is admitted *ad officium* to pray and preach, yet he is not entitled *ad beneficium* until he be formally inducted, which may be done by the delivery of the ring of the church door, or latch of the church gate, or by delivery of a clod of turf and twig of the glebe: but the most common and usual way is, and therefore the safest, by delivery of the

But, Dr. *Gibson* says, this hath not always been understood to be clear law; as appears by the many commissions which have been granted from time to time, by archbishops to their comprovincial bishops, to institute out of their diocese, and in any part of the province. Which commission, he says, nevertheless, may be understood in this sense, that though the act shall be good and valid in law when done, yet the doing it without leave is irregular. *Gibs.* 804.

11. The form and manner of the institution is, that the clerk kneeleth down before the ordinary, whilst he readeth the words of institution out of a written instrument, drawn beforehand for this purpose, with the seal episcopal appendant, which the clerk during the ceremony is to hold in his hand. 1 *Inst.* 344. *a. Johns.* 74.

Form and manner of institution.

12. Institution being given to a clerk, a distinct and particular entry thereof is to be made in the public register of the ordinary: that is, not only that such a clerk received institution on such a day, and in such a year; but, if the clerk was presented, then, at whose presentation, and whether in his own right, or in the right of another; and if collated, or presented by the crown, then whether in their own right or by lapse. This hath been the practice, as far back as any ecclesiastical records remain: and it is of great importance that such entries be duly made and carefully preserved; both to the clerk, whose letters of institution may be destroyed or lost; and to the patron, whose title may suffer in time to come, by the want of proper evidence upon whose presentation it was that institution was given. And it might tend perhaps to the better observation hereof, if every clerk, after having passed the examination of the ordinary, and thereupon obtained his fiat, were sent to the proper office of the register for his letters of institution. *Gibs.* 813.

Entry thereof in the register.

And lord *Coke* says; presentations, admissions, and institutions, are the life of advowsons: and therefore if patrons suspect that the registrar of the bishop will be negligent in keeping of them, he may have a certiorari to the bishop, to certify them into the chancery. 2 *Inst.* 358. [a]

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13. The clerk being instituted, the institution is good, without

Letters testimonial thereof.

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bell-rope to the new instituted clerk, and the tolling the bell: And the archdeacon, if he do it, is to take 40*d.* for the doing of it."

[a] In the book itself the words are *Present admissions and institutions, &c.* and so it is quoted by every one: but the sense seemeth to require (without overstraining the rules of criticism) that we should suppose the word *Present* with a dash to have been writ short in the original manuscript for *Presentations*, and so mistaken by the printer. Of which kind of errors there are divers others in that authors works, especially in those which were published after his death.

any after act: yet the ordinary is wont to make letters testimonial thereof. *Wats. c.* 15.

Stamp duty. 14. [By 55 *Geo.* 3. *c.* 184. Schedule, Part I. the following duties are imposed on,

Collation by any archbishop or bishop

To any ecclesiastical benefice, dignity, or promotion in England of the yearly value of 10*l.* or upwards in the king's books - - -	£ 20	0	0
To any other ecclesiastical benefice, dignity or promotion whatsoever in England - - -	10	0	0

Collation, institution or admission by any presbytery or other competent authority

To any ecclesiastical benefice in Scotland -	2	0	0

Institution granted by any archbishop, bishop, chancellor, or other ordinary, or by any ecclesiastical court in and to any ecclesiastical benefice, dignity, or promotion in England,

Where the same shall proceed upon a presentation	2	0	0
And where it shall proceed upon the petition of the patron to be himself admitted and instituted, if the benefice, dignity, or promotion shall be of the yearly value of 10*l.* or upwards in the king's book	30	0	0
Or if the same shall be of any other description	15	0	0

But such petition shall not be liable to any stamp duty.

Institution by any presbytery or other competent authority to ecclesiastical benefice in Scotland. See Collation, *supra.*]

The reason of the difference in amount of duty between *collation* and *institution* is, because collation standeth also in the place of a presentation, for which (in case of a living of 10*l.* a year or more in the king's books,) a like 20*l.* stamp duty is required to be paid.

Seal. 15. It is not material what seal the ordinary doth make use of in that case. *Wats. c.* 15.

Thus in the case of *Cort* and *The bishop of St. David's*, *H.* 9 *Car.*, the chancellor of St. David's had made use of the bishop of London's seal; and it was adjudged to be well enough, because it is the act of the court which makes the institution, and the instrument is only a testimonial of that act; and the seal used (whatever it be) shall be taken to be the seal of the person instituting for that time. *Cro. Car.* 341.

[170] Mandate to induct. 16. Last of all, the ordinary executeth, and delivereth to the party instituted, a written mandate to the archdeacon, or other proper person, to induct him. *Johns.* 74.

Fee. 17. By the 31 *El. c.* 6. If any person shall for any reward or other profit, or any promise or other assurance thereof, directly or indirectly (other than for usual and lawful fees), admit, institute, instal, induct, invest, or place, any person in or to any benefice with cure of souls, dignity, prebend, or other

living ecclesiastical, he shall forfeit the double value of one year's profit thereof, and the same shall be void as if such person were naturally dead. § 6.

By a constitution of archbishop *Langton*: No prelate shall extort any thing, or suffer any thing to be extorted by his officials or archdeacons, for institution, or putting into possession, or for any writing concerning the same to be made. *Lind.* 137.

And by a constitution of archbishop *Stratford*: We do ordain, that for the writing letters of institution or collation, no more shall be taken than 12*d.*; but the ordinaries shall allow stipends to their officers, wherewith they shall be contented. And for the sealing of such letters, or to the marshals of the bishop's house, or porters, nothing shall be paid. And if any person shall take any thing contrary to the premises, he shall restore double within a month: otherwise, if he is a clerk beneficed, he shall be suspended from his office and benefice; if he is not beneficed, or a lay person, he shall be interdicted from the entrance of the church until he shall make satisfaction as aforesaid. *Lind.* 222.

But generally, the ecclesiastical fees at this day are regulated by the practice and custom of every diocese, according to a table confirmed by archbishop *Whitgift*, and as is directed by the 135th canon.

Effect of institution or collation. (9)

18. The clerk by institution or collation hath the cure of souls committed to him, and is answerable for any neglect in this point. *Johns.* 71.

And as to the temporalties; whereas presentation doth give to the clerk a right *ad rem*, so institution or collation do give him a right *in re*: and therefore in virtue of collation as well as of institution, the clerk may enter into the glebe, and take the tithes, though for want of induction, he cannot yet grant or sue for them. *Gibs.* 813. (*x*)

But herein collation and institution differ; that by institution, the church is full, and plenarty by six months is pleadable against [171] all persons but the king, and against the king also when he claimeth in the right of a common person: but by collation the church is not full, nor is plenarty by collation pleadable, but the right patron may bring his writ and remove the collatee at any time: unless he be such patron who hath also right to collate, for against him plenarty by collation is pleadable. And the reason

(9) On institution to a second benefice, and before induction, the patron of the former may present, but the bishop has no right to collate by lapse without notice; but induction to the second is equivalent to notice. *Wolferstan* v. *Bp. of Lincoln and Whitehead* clerk, 2 *Wils. Rep.* 174.

(*x*) See *Ath.* 135. who says, *concessio prelati jus pinguius inducit.*

why collation doth not make a plenarty is, because then the bishop would be judge in his own cause, to the great prejudice of patrons; and therefore the bishop's collation in this respect, is interpreted no more than a temporary provision for celebration of divine service, until the patron do present. *Gibs.* 813. *Wats. c.* 12. (*y*)

Trial of institution.

19. Institution is properly cognizable in the ecclesiastical court; but if after induction a man is sued there, supposing his institution was void, that shall be tried in the temporal court, because by the induction the person hath a freehold in the benefice, which must be tried at common law. 2 *Roll's Abr.* 294.

Super-institution.

20. A church being *full by institution* (10), if a second institution is granted to the same church, this is a super-institution. Concerning which, two things have been resolved; 1. That the super-institution, as such, is properly triable in the spiritual court. 2. That it is not triable there, in case induction hath been given upon the first institution. *Gibs.* 813. (*z*)

The advantage of a super-institution is, that it enables the party who obtains it, to try his title by ejectment, without putting him about to his *quare impedit:* but many inconveniences following from thence (as, the uncertainty to whom tithes shall be paid, and the like), this method hath been justly discouraged. *Gibs.* 813.

First-fruits to be compounded for after institution.

21. By the 26 *H.* 8. *c.* 3. § 2. Every person before any actual or real possession or meddling with the profits of his benefice, shall pay or compound for the first fruits to the king's use, at reasonable days, and upon good sureties.

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VI. *Induction.* (1)

Mandate of induction.

1. After institution given, the ordinary issues a mandate for induction, directed to the person who hath power to induct.

(*y*) *Green's* case, *Co. Lit.* 344. *b.* 6 Rep. 29.

(10) *Colt and another* v. *Bp. of Coventry and another*, *Hob. Rep.* 154. *Goldsb.* 164. *Quære*, if so within 21 *H.* 8. as to make a former benefice *void.* See *Com. Dig.* tit. *Esglise,* (L) (N 5. 7.) 2 *Wils.* 174. 200. *Moor*, 448. are *cont.* See *infra*, Pluralty, *note* (1).

(*z*) Petty, incumbent of a church in Cornwall, travelled into Achaia and other parts of Greece; and it not being known whether he was alive or dead, Glanville was presented, instituted, and inducted, and Petty libelled against him in the ecclesiastical court to try the super-institution; and Noy moved for a prohibition, for since the induction the ecclesiastical court cannot try the super-institution; and Glanville being then in his first-fruits, the prohibition was granted. *Lit. Rep.* 140. See also 2 *Lev.* 125.

(1) As to induction, see argument, 2 *Wils. Rep.* 183—191. Before which the clerk is not complete incumbent, nor can he grant or sue for tithes. *Com. Dig.* tit. *Esglise,* (L). 2 *Inst.* 358.; but *quære,* see V. 20.

And this person, of common right, is the archdeacon. But, by prescription or composition, others as well as archdeacons may make inductions (2); for by prescription the dean and chapter of Lichfield do make induction, and so do the dean and chapter of St. Paul's. *Wats. c.* 15.

So if a church is exempt from archidiaconal jurisdiction (as many churches are), then the mandate is to be directed to the chancellor or commissary; and if it be a peculiar, then to the dean or judge within such peculiar. And when an archbishop collates by lapse, or when a see is vacant, the mandate goes, not to the officer of the archbishop, but to the bishop. *Gibs.* 815.

If a bishop dies, or is removed, after institution given, and whilst a mandate of induction is either not issued, or not executed; the clerk may repair to the archbishop for a mandate of induction. This is, because the authority of the bishop is determined, and that authority devolved to the archbishop, as guardian of the spiritualties *sede vacante*. And the same rule takes place, if the bishop is visited, and his jurisdiction suspended, after institution and before induction. And though such mandate is not executed before a new bishop is confirmed (who then hath authority to grant it), but is executed after; it shall not be void (because it is the act of one who hath authority throughout his province), but only voidable at most; as was determined in the exchequer chamber, *M.* 29. *C.* 2. in the case of *Robinson* and *Wolley*; a contrary judgment, which had been given in the court of king's bench (viz. that it was void), (3) being at the same time reversed. *Gibs.* 815. (4)

[It seems not clear from the words of 55 *G.* 3. *c.* 184. whether the ordinary's mandate for induction shall be on a 2*l.* or on a 5*s.* stamp; the words (SCHEDULE, Part the First, tit. *Licence* and *Notarial Act*) are,

Licence of any kind, not otherwise charged in this schedule, which shall pass the seal of any archbishop, bishop, chancellor, or other ordinary, or of any ecclesiastical court in *England*, or which shall be granted by any presbytery or other ecclesiastical power in *Scotland* - - - - - - - - -	£2	0	0
Notarial Act whatsoever, not otherwise charged in this schedule - - - - - - -	0	5	0

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(2) 11 *H.* 4. 9.
(3) 1 *Ventris*, 309. 319.
(4) Sir *T. Jones*, 78. But if the guardian of the spiritualties institutes and makes a mandate for induction, and before induction a new bishop is consecrated, the mandate becomes void. 2 *Lev.* 199. S. C.

And for every sheet or piece of paper, parchment, or vellum, upon which the same shall be written, after the first, a further progressive duty of - £0 5 0]

The archdeacon, or other person to whom the mandate is directed, either maketh the induction in person, or directeth his precept unto others to do it. *Gibs.* 815. (5)

Manner of induction.

2. And the induction is to be made according to the tenor and language of the mandate; by vesting the incumbent with full possession of all the profits belonging to the church. Accordingly the inductor usually takes the clerk by the hand, and lays it upon the key, or upon the ring of the church door, or if the key cannot be had, and there is no ring on the door, or if the church be ruinated, then on any part of the wall of the church or church-yard, and saith to this effect: "By virtue of this man-" date, I do induct you into the real, actual, and corporal " possession of this church of C. with all the rights, profits, " and appurtenances thereto belonging." After which, the inductor opens the door, and puts the person inducted into the church: who usually tolls a bell, to make his induction public and known to the parishioners. Which being done, the clergyman who inducted, indorseth a certificate of his induction on the archdeacon's mandate, and they who were present do testify the same under their hands. *Johns.* 77. *Wats. c.* 15.

If the inductor, or person to be inducted, be kept out of the church or parsonage house by laymen, the writ *de vi laica removenda* lies for the clerk, which is directed out of chancery, to the sheriff of the county, to remove the force, and (if need be) to arrest and imprison the persons who make resistance. *Johns.* 75.

If any other clergyman, presented by the same patron with the person to be inducted, doth keep possession; then a *spoliation* is grantable out of the spiritual court; whereby the profits shall be sequestered, till the right be determined. *Johns.* 75.

But donatives are given and fully possessed, by the single donation of the patron in writing; without presentation, institution, or induction. *Gibs.* 819.

So if the king doth grant one of his free chapels, the grantee shall be put in possession by the sheriff of the county, and not by the ordinary of the place. *Wats. c.* 15.

And in some places, a prebendary shall have possession without induction; as at Westminster, where the king makes his collation by his letters patent, and thereupon the party enters

(5) If the archdeacon refuses induction, he may be sued in the spiritual court, or an action on the case lies against him. *Robinson* v. *Wolley*, 1 *Ventris*, 309. *F. N. B.* 47. H. And the bishop cannot revoke his mandate, nor can a prohibition of its execution be made by the king. *Ibid.*

upon the prebend without other induction, and it is good. And in some places the bishop makes the induction, in some places others make it; and the usage generally shall hold place. *Wats. c.* 15.

But the possession of sine-cures must be obtained by the same methods by which the possession of other rectories and vicarages is obtained; namely, by presentation, institution, and induction. *Gibs.* 818.

3. By a constitution of archbishop *Stratford*, it is ordained, that *for the writing letters of institution or collation, and commissions to induct, or certificates of induction, no more shall be taken than* 12*d*. Lind. 222. Fee for induction.

Which sum was considerable in those days, being nearly equal to 20*s*. now.

But (as was said before of institution) these fees are generally regulated according to the custom of the respective places.

But as to the expences of the induction itself, it is directed more at large by a constitution of the same archbishop as followeth: We do decree, that *they who are bound by the mandate of their superior* to induct clerks admitted to ecclesiastical benefices, shall be content with moderate expences *for such induction to be made;* that is to say, *if the archdeacon induct, he shall be satisfied with* 40*d*.; *if his official, he shall be contented with* 2*s*.; for all and every the expences of themselves and their servants *for their diet; reserving nevertheless to the person inducted his option, whether he will pay this procuration* to the inductor and his attendants *in such sum of money*, or in other necessaries. And *if more than this shall be taken by the inductors by reason of the premisses*, or if they shall take any more for making the induction by themselves in their own persons, or if they shall delay by artificial pretences, to make and deliver to the clerks inducted *letters certificatory* of their induction: *they who shall be unduly culpable* in this behalf, shall be suspended from their office and entrance into the church, until they shall make restitution. *Lind.* 140.

That they who are bound] By this it appears, that it is not in the archdeacon's power to induct or not induct, after he hath received the mandate from his superior; because he is bound to obey his mandates, and so this importeth a necessity. *Lind.* 140.

By the mandate] For neither the archdeacon nor any other ought to induct any person into a church, without a mandate from the person instituting. *Lind.* 140.

Of their superior] As, of the archbishop, or any other, to whom by right or custom institution belongeth. *Lind.* 140.

For such induction to be made] That is, for the expences concerning the induction. *Lind.* 140. [175]

If the archdeacon induct] For it is his office (saith Lindwood) to induct persons admitted to ecclesiastical benefices into corporal possession of the said benefices. *Lind.* 140.

He shall be satisfied with 40*d.*] Which sum in those days was sufficient (Lindwood says) for four persons and as many horses, together with one sumpter horse. *Lind.* 140.

If his official] So that it is not required in the induction, that the archdeacon perform this act in his own person, but he may execute it by another. *Lind.* 140.

He shall be contented with 2*s.*] Namely for two or three horses at the most. *Lind.* 140.

For their diet] To wit, victuals for themselves, and provender for their horses, for one day and night. *Lind.* 143.

Reserving nevertheless to the person inducted his option] Which at this day (Dr. Gibson saith) the person inducted hath lost by custom. *Gibs.* 814.

Whether he will pay this procuration in such sum of money] Namely of 40*d.* when he is inducted by the archdeacon, or 2*s.* when he is inducted by his official. But what if he be inducted (saith Lindwood) by any other than by the archdeacon or his official, but by the archdeacon's mandate; whether then may the archdeacon take any thing for such induction? I think not (he says); but such inductor shall have from the inducted his necessary expences suitable to his degree, under the like moderation as is appointed for the archdeacon or his official. *Lind.* 140.

If more than this shall be taken by the inductors, by reason of the premisses] But whether may the archdeacons, besides the expences for their diet (as the constitution expresseth it) take any thing of the person inducted in the name of fees to be paid to himself and his officers (as perhaps where it hath been the custom to pay something certain upon such account) without incurring the penalty of this constitution? It seemeth (said Lindwood) that they may, to wit, for their personal labour, and other necessary expences, exclusive of their diet as aforesaid; that is to say, without incurring the penalty hereby inflicted; for the constitution doth not prohibit them expressly, and penal laws are to be taken strictly. But they may be otherwise punished as simonists. *Lind.* 141.

Letters certificatory] Whereby according to their mandate the inductors do certify whether they have actually inducted the [176] clerk instituted or not; and these letters certificatory in common speech are called letters of induction. *Lind.* 140.

They who shall be unduly culpable] That is, without reasonable cause, or just impediment. *Lind.* 141.

Effect of induction. 4. After institution, the clerk is not complete incumbent 'till after induction; or, as the canon law calls it, corporal pos-

session. (*a*) For by this it is, that he becomes seised of the temporalties of the church, so as to have power to grant them, or sue for them (6); by this, he is unexceptionably entitled to plead (as occasion shall require) that he is parson imparsonee; and by this also the church is full, not only against a common person (for so it is by institution) but also against the king; and by consequence, it is completely full, and the clerk is complete incumbent or possessor. On which account it is compared, in the books of common law, to livery and seisin; by which possession is given to temporal estates. And what induction worketh in parochial cures, is effected by instalment into dignities, prebends, and the like, in cathedral and collegiate churches. *Gibs.* 814. (*b*)

5. Induction is an act of a temporal nature. So the books of common law every where declare (notwithstanding it is an act of spiritual persons about a spiritual matter); because it instates the incumbent in full possession of the temporalties, as these are opposed to the spiritual office or function. Upon which account it is cognizable only in the temporal courts. *Gibs.* 815. (*c*) **Induction of temporal cognizance.**

And upon the like ground it is held, that the archdeacon, if he refuse or delay to induct, is not only punishable by spiritual censures, but is also liable to an action on the case in the temporal court. *Id.*

In the archbishop's registry, mention is made of *appeals* to the archbishop, where the person who had been instituted was denied induction, or the mandate of induction; and liberty given, in other instances, to persons who pretended an interest, to shew cause why induction ought not to be granted, after institution given. *Id.*

VII. *Requisites after Induction.* [177]

1. By the 13 & 14 C. 2. c. 4. § 6. Every person who shall be presented or collated or put into any ecclesiastical benefice or **To read the common prayer, and declare assent thereunto.**

(*a*) *Com. Dig.* tit. *Esglise* (L). Nor does the avoidance of a former benefice take place; so that a lapse shall accrue to the ordinary till induction to the second. *Bishop of Lincoln* v. *Wolferstan.* 3 *Bur.* 1510.

(6) By induction the parson is put in possession of a part for the whole, and may maintain an action for a trespass on the glebe land, though he has not taken actual possession of it. *Bulwer* v. *Bulwer*, 2 *Barn. & Ald. Rep.* 470.

(*b*) *Plow.* 528. *Dy.* 221. b. 2 *Roll. Rep.* 451. Plowden says, installation is to be done to the prebendary by the dean and chapter; and induction to the parson or vicar by the archdeacon. *Ib.*

(*c*) *Hob.* 15. *Sherock* v. *Boucher*, *Lev.* 125. 1 *Ld. Raym.* 88. S. C.

promotion, shall in the church, chapel, or place of public worship belonging to his said benefice or promotion, within two months next after that he shall be in the actual possession of the said ecclesiastical benefice or promotion, upon some Lord's day, openly, publickly and solemnly, read the morning and evening prayers, appointed to be read by and according to the book of common prayer, at the times thereby appointed or to be appointed: and after such reading thereof, shall openly and publickly, before the congregation there assembled, declare his unfeigned assent and consent to the use of all things therein contained and prescribed, in these words, and no other: "*I A. B.* "*do here declare my unfeigned assent and consent to all and every* "*thing contained and prescribed in and by the book, intituled, The* "*book of common prayer and administration of the sacraments,* "*and other rights and ceremonies of the church, according to the* "*use of the church of England; together with the psalter or* "*psalms of David, pointed as they are to be sung or said in* "*churches; and the form or manner of making, ordaining, and* "*consecrating of bishops, priests, and deacons.*"

And every such person who shall (without some lawful impediment to be allowed and approved by the ordinary of the place) neglect or refuse to do the same within the time aforesaid (or in the case of such impediment, within one month after such impediment removed), shall *ipso facto be deprived* (7) of all his said ecclesiastical benefices and promotions; and from thenceforth it shall be lawful for all patrons and donors of all and singular the said ecclesiastical benefices and promotions, according to their respective rights and titles, to present or collate to the same, as though the person or persons so offending or neglecting were dead.

To read the thirty-nine articles, with declaration of assent.

2. By the 13 *Eliz.* c. 12. § 3. Every person *admitted to any benefice with cure,* shall publickly read *the articles of religion therein mentioned,* agreed upon in convocation in the year 1562, in the parish church of that benefice, with declaration of his unfeigned assent to the same: and every person admitted to a benefice with cure, *except that within two months after his induction* he do publickly read the said articles, *in the same church whereof he shall have cure, in the time of common prayer there, with declaration of his unfeigned assent thereunto; shall be upon every such default* ipso facto *immediately deprived.*—Provided,

[178] that no title to confer or present by lapse, shall accrue upon any

(7) But no title to present by lapse accrues by such deprivation till 6 months after notice given by the ordinary to the patron, or sentence of deprivation publicly read in the parish church. *Id.* § 16. See *Bacon* v. *Carlisle, infra*, p. 180.

deprivation ipso facto, *but after six months after notice of such deprivation given by the ordinary to the patron.* § 8.

Admitted to any benefice with cure] This is meant of such benefices as have parochial churches belonging to them; and extends not to dignities or prebends in cathedral and collegiate churches. And therefore where the case was about reading the articles, and it was not alleged in the declaration that the benefice was a benefice with cure, it was held to be ill. (8) 1 *And.* 62.

The articles of religion therein mentioned] The words in the foregoing part of the act are *all the articles of religion which only concern the confession of the true Christian faith and the doctrine of the sacraments, comprised in a book, intituled, Articles whereupon it was agreed by the archbishops and bishops of both provinces, and the whole clergy in convocation, in the year* 1562: and as there may be some doubt whether this clause in § 3. referring to the *said articles,* means all the 39 articles so agreed upon in convocation, or only those of them which concern the confession of the true faith and doctrine of the sacraments, it hath been thought adviseable to read the whole number, with declaration of assent to the same.

Except that within two months after his induction] Computing twenty-eight days to the month: for in the case of *Brown* and *Spence,* where the induction was Sep. 15., and the articles were read Nov. 15., this was adjudged insufficient. 1 *Lev.* 101. (*d*)

But by statute 23 *G.* 2. *c.* 28. § 2. Whereas it hath happened, and may happen, through sickness or other lawful impediment, that divers persons have been and may be hindered from reading the said articles and making the said declaration, within the two months; and yet such person, after such sickness, or other lawful impediment removed, hath read or may read the said articles, and hath made or shall make the said declaration; and it is [179]
reasonable that such persons should be deemed to have complied with the true intent and meaning of the said act: *it is therefore*

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(8) Thus a stipendiary priest provided by a lessee of a benefice with cure under a deanery, &c. must declare his assent according to the statute, though no presentation is required, but only nomination to the dean, and approbation by him. *Carver* v. *Pinkney.* 3 *Lev.* 83.

(*d*) This computation of twenty-eight days to the month differs from the computation of the six months during which the patron is to present, which are accounted to be 182 days, or *dimidium anni.* 2 *Inst.* 360. 6 *Rep.* 61. *b.* But in the case in *Levinz,* the reading of the articles could not be said to be *within* the two months, even if the months were reckoned according to the calendar. For where the computation is to be made from or after an act done, the day of doing the act is to be included. *Rex* v. *Adderley, Doug. Rep.* 464. *Bellasis* v. *Hester,* 1 *Raym.* 280.

enacted, that every person who hath read or shall read the said articles, and hath made or shall make the said declaration, at the same time that he did read or shall read the morning and evening prayer, and declare his unfeigned assent and consent thereunto according to the form in 13 & 14 C. 2. c. 4. § 6. shall be and is hereby declared and adjudged to have complied with the true intent and meaning of the said act of the 13 Eliz. although the same were not or may not be read within the space of two months after such person's induction into any benefice with cure; and every such person shall be freed and discharged from any deprivation or other forfeiture by virtue of the said act.

In the same church whereof he shall have care] In the aforesaid case of *Brown* and *Spence*, where the keys of the church could not be had, and so divine service was performed in the church porch, and the articles read there; this was held to be a sufficient reading, as Keble reports it: But by Levinz, what the court there held to be good was, the reading of them in the porch of a chapel of ease within the parish. 1 *Lev.* 101.

In the time of common prayer there] And therefore not to be put off till divine service or common prayer is ended. *Gibs.* 117.

With declaration of his unfeigned assent thereunto] In the case of *Smyth* and *Clerk*, the jury found, that the incumbent (who was sued in the spiritual court in order to deprivation for not giving assent to the articles) did read the articles, and then said, "I "give my consent unto them, so far forth as they agree with the "word of God;" and it was adjudged, that this was not such an unfeigned assent as the statute intendeth; but that the assent ought to be absolute and without condition. For (as lord *Coke* saith) the act was made for the avoiding diversity of opinions; and by this addition the party might, by his own private opinion, take some of them to be against the word of God: and by this means diversity of opinions should not be avoided, and the act hereby made of none effect. *Gibs.* 817. 4 *Inst.* 324.

Shall be upon every such default] But in a suit for tithes, or the like, though the parishioner may plead that the parson did not read the thirty-nine articles, yet the law presumes the [180] affirmative, and (in that case) the negative must be proved. *Gibs.* 817. (*c*)

Ipso facto immediately deprived] So as the church is presently void, without any declaratory sentence; for avoidance by act of parliament needeth not any sentence declaratory, and if it did, the statute should be defrauded at the ordinary's pleasure if he would not deprive. And this is the received interpretation of the statute; although the contrary seems to be supposed in the case

(*c*) For it is not to be supposed that a man would rather lose his benefice than read the articles. *Monke* v. *Butler.* 1 *Roll. Rep.* 83.

of *Bacon* and *The bishop of Carlisle* (which was but six years after making of the act): as it is reported by Dyer; inasmuch as the notice given by the bishop is there declared insufficient, for this among other reasons, that he did not notify that he had deprived the clerk by such sentence. *Gibs.* 817. 4 *Inst.* 324. (9)

But after six months after notice of such deprivation given by the ordinary to the patron] In the aforesaid case of *Bacon* and *The bishop of Carlisle*, a question arose concerning the manner of giving notice. The bishop of Carlisle had signified in an instrument under seal, that Bacon had not subscribed to the articles, according to the statute; which instrument, the jury found, was publickly read in the church by the curate of the place, and afterwards affixed by the apparitor to the parsonage house. But this notice was declared insufficient, not only because no mention was made therein either of the patron, or of the deprivation by declaratory sentence; but chiefly because the notice ought to have been given to the patron immediately. And accordingly, lord *Coke* lays down two qualifications of the notice mentioned in this act: 1. It ought to be given by a person certain, that is, the ordinary; for if any other, of his own head, giveth notice to the patron, it is not material. 2. The notice ought to be certain and particular; and therefore it is not sufficient for the ordinary in such case, to give notice that the presentee had not read the articles and subscribed, generally; but he ought particularly to inform the patron that he had not so done, for which default he is deprived, and that thereupon it belongeth to the patron to present. *Gibs.* 818. 6 *Co.* 29. [and see *Dir.* I. 18. n.]

Declaration of conformity to the established church.

3. By 13 & 14 *C.* 2. *c.* 4. § 11. He shall publicly and openly read the ordinary's certificate of his having subscribed the declaration of conformity to the liturgy of the church of England as it is now by law established, together with the same * declaration or acknowledgment, upon some Lord's day within three months next after such subscription, in his parish church where he is to officiate, in the presence of the congregation there assembled, in the time of divine service; upon pain that every person failing therein without some lawful impediment to be allowed and approved by the ordinary of the place, 23 *G.* 2. *c.* 28., shall lose such parsonage, vicarage, or benefice, curate's place, or lecturer's place respectively; and shall be utterly disabled, and *ipso facto* deprived of the same; and the said parsonage, *[181]

(9) A man deprived for not giving his assent within two months is not disabled to be presented *de novo*, and if a stipendiary priest continues in the exercise of his function after the two months with approbation of the nominor and dean who ought to approve; this amounts to a new nomination, and giving his assent, &c. at any time is sufficient. *Carver* v. *Pinkney*. 3 *Lev.* 83.

vicarage, or benefice, curate's place, or lecturer's place shall be void, as if he was naturally dead. (g)

A doubt hath been raised, whether the design of the act was, that the clerk should only read the bishop's certificate to the congregation, in testimony of his having subscribed the declaration before him; or whether, after having read the certificate, he should not also make the same declaration again in form, before the congregation; which point hath never been judicially determined; but the latter opinion is not only more safe, but hath also been thought more agreeable to the tenor of the act, than the bare reading of the certificate. *Gibs.* 817.

To keep a memorandum of the same.

4. If a parson or vicar claimeth tithes in right of the church or benefice whereof he is incumbent; he is in strictness bound to prove his institution, induction, and all things else required by law to qualify him to be incumbent of that church to which the tithes belong. But if he hath been for several years in possession, he is not ordinarily put to prove these matters, unless the defendant in his defence sheweth some reasons why these things ought to be proved and made out. But the law doth not determine how many years the plaintiff ought to be in the possession of his benefice, to excuse him from being put to the proof of these things; but that seems to be left to the discretion of the judge who tries the cause: though it seemeth that a small number of years, as three or four years quiet possession, may be sufficient. *Bohun of Tithes*, 433.

And in the case of *Woodcock* v. *Smith*, *T.* 1718; it was declared by the whole court of exchequer, that although at law they hold a parson or vicar to the proof of his admission, institution, and induction and reading the articles; yet they never do it in equity. *Bunb.* 25.

In *Powel* v. *Milbank*, *M.* 13 *G.* 3. on an action for money had and received to the plaintiff's use, the defendant pleaded the
[182] general issue, and the cause came on to be tried before *De Grey* chief justice at the sittings after Easter term. A verdict was given for the plaintiff, on the following case. The plaintiff in 1770, was nominated and appointed to the donative of *Chester le Street* in the diocese of *Durham*, with cure of souls. He was then in priest's orders, and had subscribed the thirty-nine articles, and the three articles in the 36th canon, at the time of his ordination: but did not prove at the trial of the cause (though required so to do), that he subscribed the articles before the bishop of *Durham* as ordinary of the diocese; nor that he had publicly read the same in the church of *Chester le Street* aforesaid, with declaration of his assent to the same; nor that he had subscribed the declaration in the statute of 13 & 14 *G.* 2. since his nomination to the donative; nor that he had a licence from the bishop to

(g) *Vide ante*, p. 166. (8)

preach in the said church of *Chester le Street.* The question was, Whether he was in a situation to maintain this action? The case was argued in two several terms; after which the lord chief justice delivered the opinion of himself, *Gould, Blackstone,* and *Nares,* justices. — There have been two questions made upon this case: First, Whether an incumbent of a donative with cure is obliged to conform to the statutes of Elizabeth and Charles the second? Secondly, Whether in this action, it was necessary for him to give evidence that he had performed the several requisites contained in these statutes? As our opinion is founded upon the second question, it is not necessary, nor do we give any judicial determination upon the former. But we strongly incline to think, that donatives, with cure of souls, are within all the reasons, religious as well as political, upon which those acts are founded. As to the second question, We are all of opinion, that in the present case, as no evidence was given by the defendant to raise a doubt whether the plaintiff had subscribed, it was not incumbent on him to give evidence of his having actually done so. The presumption always is, that every man conforms to the law; and that presumption shall stand, till something appears to shake it. Nor is the defendant hereby put upon proving a direct negative. It is a negative qualified with circumstances. Some of these ceremonies are to be performed, publickly, within a limited time; registers are kept of others. And if evidence had been given, that a person had regularly attended the church, and heard nothing of this matter: or if a search had been made in the bishop's register, and nothing had been found therein, this would have destroyed the presumption, and put the plaintiff on proof of his having performed those requisites. And he mentioned [183] Dr. *Sherard's* case, before Mr. Justice *Wilmot,* at *Sarum* assizes, about ten years before; where a prebendary brought an ejectment for a house belonging to his prebend, and was required to shew that he had performed the requisites necessary by law to make him prebendary; the judge held, that it ought to be presumed he had performed them, till something appears to the contrary. *Bla. Rep.* 851. 1 *Term Rep.* 399. note.

In order that the clerk may be prepared to make proof of these matters, when called upon, it may be convenient that he have some intelligent persons whom he may trust, present when he is inducted; and (if it may be) the same persons present at such time when he shall perform the other matters required by the law to be performed in his parish church; and to the end that they may be able to testify, that all things are done as they ought to be, the clergyman may desire them to read with him, or to observe as he reads the morning and evening prayer, and also the thirty-nine articles; and he ought also to give them a copy of his certificate under the hand and seal of the bishop, and of the

declarations which he is to read; for otherwise, if their testimony be wanted, it will be hard for them to depose, that he read a true copy thereof, and that all things were done according to law. And it is also adviseable, that he make a writing to be subscribed by his witnesses, after this or the like form:

We, whose names are underwritten, do hereby certify and declare, that A. B. *rector of* C. *within the diocese of* D. *in the county of* E. *was in the presence of us inducted into his church of* C. *aforesaid, by* F. G. *rector of* H. *on the ——— day of ——— in this present year, by virtue of certain letters of induction made under the hand and seal of* I. K. *archdeacon of* L. *within the diocese aforesaid for that purpose directed* To all and every, &c. *And also that the aforesaid* A. B. *on the ——— day of ——— in the year aforesaid, being the Lord's day, did read in his parish church aforesaid, openly, publickly, and solemnly, the morning and evening prayers appointed to be read by and according to the book, intituled* "The "book of common prayer, and administration of the sacraments, "and other rites and ceremonies of the church, according to the "usage of the church of England, together with the psalter or "psalms of David, pointed as they are to be sung or said in "churches, and the form or manner of making, ordaining, and "consecrating of bishops, priests, and deacons," *at the time*
[184] *thereby appointed; and after such reading thereof did, openly and publickly before the congregation there assembled, declare his unfeigned assent and consent to the use of all things therein contained and prescribed, in these words following,* "I A.B. do here de-"clare my unfeigned assent and consent to all and every thing "contained and prescribed in and by the book intituled, The "book of common prayer and administration of the sacraments, "and other rites and ceremonies of the church, according to the "use of the church of England; together with the psalter or "psalms of David, pointed as they are to be sung or said in "churches; and the form or manner of making, ordaining, and "consecrating of bishops, priests, and deacons." *Also that he did publickly and openly on the day and in the year aforesaid,* [if it is done on the same day; but if it is done on any other day, then the same must be set forth accordingly, or it may be certified separately in a separate certificate] *in the parish church aforesaid, in the presence of the congregation there assembled, in the time of divine service, read a certificate under the hand and seal of the right reverend father in God* R. lord bishop *of* C. [or as the case shall be] *in these words following* [inserting the very words of the certificate] *and immediately after the reading thereof, at the same time, and in the same place, the congregation aforesaid being then and there present, did read the declaration or acknowledgment contained in the said certificate, to wit,* "I A. B. do declare, that I "will conform to the liturgy of the church of England, as it is

"now by law established." *And lastly, that he did, on the day and in the year aforesaid, read the articles of religion, commonly called the thirty-nine articles, agreed upon in convocation, in the year of our Lord one thousand five hundred sixty and two, in the parish church aforesaid, in the time of common prayer there, and did declare his unfeigned assent thereunto. And these things we promise to testify upon our oaths, if at any time we shall be lawfully thereunto required. In witness whereof, we have hereunto set our hands, this —— day of —— in the year of our Lord*

5. Finally, he shall, within six months after his admission, take the oaths of allegiance, supremacy, and abjuration, in one of the courts at Westminster, or at the general quarter-sessions of the peace; on pain of being incapacitated to hold the benefice, and of being disabled to sue in any action, or to be guardian, or executor, or administrator, or capable of any legacy or deed of gift, or to bear any office, or to vote at any election for members of parliament, and of forfeiting 500*l*. 1 *G. st.* 2. *c.* 13. 9 *G.* 2. *c.* 26. (*h*)

To take also the oaths at the sessions.

[5 *a.* As to exchanging, purchasing, &c. parsonage-houses, glebe lands, &c. See **Glebe lands**, 5.]

Exchanging benefices.

Benefit of clergy.

1. THE privilege of clergy took its root from a constitution of the pope, that no man should accuse the priests of holy church before a secular judge; which, being contrary to the crown and dignity of the king and the common law, bound not here, till it was confirmed by parliament. 2 *Inst.* 636. (*i*)

Benefit of clergy by the common law.

(*h*) By 6 *Geo.* 3. *c.* 53. the form of the oath of abjuration is altered.

(*i*) X. 2. 1. 8. 2. 1. 10. 2. 1. 17. 2. 2. 2. The first of these epistles is attributed by some to Alexander 3. who was consecrated in 1159; by others to Lucius 3. who filled the see of Rome in 1181. The second and third authorities are taken from epistles of Celestinus 3. who flourished ten years after Lucius. But the fourth authority is said to be a decree of the council of Paris, which was holden under Eugenius 2. in the beginning of the ninth century. It appears from a passage of Bracton, cited in 2 *Inst.* 633. as also from the statute *West.* 1. c. 2. that the clergy introduced the same law here at a very early period. Lindwood (*de Foro Competenti*, p. 93.) says, "a clerk cannot be said to be convicted before a lay judge, so at least as to be condemned by such a conviction." And the constitution of Boniface, of which he there treats, excommunicates those who detain clerks against the requisition of the ordinary. This prelate was archbishop of Canterbury, and published constitutions in 1260, which lord *Coke*

Confirmation thereof by the statute law.

2. Concerning which, it is enacted as follows: When a clerk is taken for guilty of felony, and is demanded by the ordinary, *he shall be delivered to him according to the privilege of holy church. And they which be indicted of such offences by* solemn inquest of lawful men *in the king's court*, in no manner shall be delivered without due purgation. 3 *Ed.* 1. c. 2.

When a clerk] For the scarcity of clergy in the realm of England, to be disposed of in religious houses, or for priests, deacons, and clerks of parishes, there was a prerogative allowed to the clergy, that if any man that could read as a clerk were to be condemned to death, the bishop of the diocese might, if he would, claim him as a clerk; and he was to see him tried in the face of the court, whether he could read or not: the book was prepared and brought by the bishop, and the judge was to turn to some place as he should chuse, and if the prisoner could read, then the bishop was to have him delivered over unto him, to dispose of in some places of the clergy, as he should think meet: but if either the bishop would not demand him, or the prisoner

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reprobates as usurping and incroaching upon many matters which belonged to the common law. 2 *Inst.* 599. In one of these it is enacted, that every bishop shall have one or two prisons in his diocese, in which he shall incarcerate for life those clerks who by the secular law would have suffered death. See his constitutions at the end of *Lindw.* edit. Ox. p. 21. But lord *Coke* says, that when one of the clergy was indicted of felony, and the ordinary demanded him, yet to the end that it might be known *what sort of a person was delivered to the ordinary;* an inquest was charged to inquire whether he were guilty or no? And though he was found guilty by this inquest of office, yet was he delivered to the ordinary, *and his chattels seized, and his lands taken into the king's hands.* In truth, this demand of the clergy was watched with a jealous eye, and considered to be an usurpation by the laity. *Reeve's Hist. of the Eng. Law, part* 2. *c.* 10. There are accordingly some instances of clerks being executed, and others, owing to convictions of felony, were forced to abjure the realm; but the 9 *Ed.* 2. *c.* 15. commonly called *Articuli Cleri*, restored and confirmed the ancient custom of the realm, as stated by lord *Coke*, provided the clerk submitted himself to the law of the kingdom. Since then this privilege, which the clergy grounded on the text, "touch not mine anointed and do my prophets no harm," has been regulated by various acts of parliament; and we now, says Mr. Justice *Foster*, "consider the benefit of clergy, or rather the benefit of the statutes, as a relaxation of the rigour of the law, a condescension to the infirmities of human nature." See *Keilway*, 181. and *Foster, Rep.* 305. The only exception to the rule of the canon law, that a clerk was not to be tried by a secular judge, was against those who after three monitions committed crimes in a secular dress and tonsure; "alleging," says the text, "the privilege of a clerical trial with their lips, although they had shortly before denied their clergy by their actions." X. 5. 39. 45.

could not read, then was he to be put to death. *Bacon's Use of the Law*, 122. (*k*)

A clerk] And by a favourable interpretation of the statutes relating to the clergy, not only those actually admitted into some inferior order of the clergy, but also those who were never qualified to be admited into orders, have been taken to have a right to this privilege as much as persons in holy orders, whether they were persons lawfully born or bastards, aliens or denizens, in the communion of the church or excommunicate, within the common benefit of the law or outlaws; so that they were not hereticks convict, nor jews, mahometans, nor pagans, nor under [187] perpetual disability of going into orders admitting of no dispensation, as blind and maimed persons formerly were, and women still are; nor liable to the objection of bigamy, which (by a constitution of the council of Lyons received in this kingdom) was a bar to the demand of the privilege of the clergy. 2 *Hawkins' Pleas of the Crown*, 338.

And by the 3 *W.* c. 9. where a *man* being convicted of any felony for which he may demand the benefit of his clergy, if a woman be convicted for a like offence, upon her prayer to have the benefit of this statute, judgment of death shall not be given against her, but she shall suffer the same punishment as a man should suffer, that has the benefit of clergy allowed. § 6.

Is taken for guilty of felony] This statute, and the custom of the realm, restrained the benefit of clergy only to felony; so as they were to answer to high treason, and all offences under felony. 2 *Inst.* 636.

And is demanded by the ordinary] Yet a man might wave the privilege of his clergy if he would, and put himself upon his country. 2 *Inst.* 638.

By solemn inquest of lawful men] Before this statute, if any clerk had been arrested for the death of a man, or any other felony, and the ordinary did demand him before the secular judge, he was delivered without any inquisition to be made of the crime; but after this statute, to the end that the ordinary might have more care of purgation to be duly done according to the provision of this act, when any clerk was indicted of any felony, and refused to answer to the felony, but claimed the privilege of the clergy, and was demanded by his ordinary, yet he was not delivered to the ordinary before he had been first indicted and arraigned, and his offence had been inquired of and found by an inquest of office: which was done, both to the end that if the prisoner were found guilty, he might absolutely forfeit his goods

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(*k*) The usual test of the prisoner's learning was the verse *Miserere mei Deus*, which, on that account, was called the *neck verse*. *Foster*, *Rep.* 306.

(which anciently were saved by a purgation), and also that the court might be apprised, whether it were proper from the circumstances of the case, disclosed upon such an inquiry, to deliver the clerk to the ordinary *generally*, in which case he was allowed to make his purgation; or *specially, without purgation to be made*. But this practice being found inconvenient to prisoners, because they lost their goods, if found guilty by such inquiry, and yet could take no challenge to any of the jury, it being but an inquest
[188] of office, it hath been the general practice ever since the reign of *Hen.* 6. to oblige those who demand the benefit of clergy, to plead and put themselves upon their trial, under pain of being dealt with as those that stand mute, whereby they forfeit their goods without any inquiry concerning their crime. 2 *Inst.* 164. 2 *Hawk.* 358.

In no manner shall be delivered without due purgation] When a person was delivered to the ordinary, he was to remain in the ordinary's prison: if committed generally, then he might make his purgation; which was a trial before the ordinary by a jury of twelve clerks, wherein if he was acquit, he was discharged; if found guilty, he was degraded, and delivered over to the secular power. And when he had made his purgation, he had always restitution of his lands seized, unless he were attaint. And as touching his goods, the difference was thus: If before conviction, upon his arraignment, the prisoner had his clergy (as was used commonly before the time of *Hen.* 6.), then if he made his purgation, he had restitution of his goods, unless he had fled: But if he had pleaded to inquest, and were convict, then the goods were forfeited by the conviction, and he should not have restitution upon his purgation. 2 *Hale's Hist. Pl. Cr.* 314. 2 *Inst.* 638. 23 *H.* 8. *c.* 1. § 5, 6.

But if the clerk were delivered to the ordinary *without purgation to be made*, there he continued prisoner during his life, unless pardoned by the king; and the king had not only his goods as absolutely forfeited, but also the profits of his lands during his life. 2 *H. H.* 384.

Without due purgation] Lord *Coke* says, before this statute, purgations were unduly made, more for favour, than for furtherance of justice; whereby malefactors were encouraged to offend: And the evil was not remedied by this act, but the abuses in making purgation still continued, and in the end became so intolerable, that queen Elizabeth by consent of Parliament, took it quite away. 2 *Inst.* 165. (*l*)

How far, and in what respects,

3. Again; the benefit of clergy is further confirmed, by the statute of the 25 *Ed.* 3. *st.* 3. *c.* 4. by which it is enacted, that all

(*l*) On the subject of purgations, see *Hob.* 290. and 4 *Bl. Com.* 368.

manner of clerks, which shall be convicted before the secular judges, for any treasons or felonies, touching other persons than the king himself, shall freely have and enjoy the privileges of holy church. clergy is allowed by the statute law.

[189]

In all cases of high treason, clergy was never allowed in this kingdom. 2 *H. H.* 330.

But by the common law, in all cases of felony or petit treason, clergy was allowable, excepting two, viz. 1. *Insidiatores viarum et depopulatores agrorum.* 2. Wilful burning of houses. And the cause why these were excepted was, because by interpretation of law they are hostile acts. And therefore sometimes these words, *insidiatores viarum et depopulatores agrorum*, were put in the indictments of clerks, on purpose to oust them of the benefit of clergy; which caused the act of the 4 *H.* 4. *c.* 2. to be made, to put these clauses out of indictments, and to allow clergy if they were in them. 2 *H. H.* 328. 330. 333.

And by this statute clergy is allowed in all treasons or felonies (except treasons against the king); so that after this statute there was clergy in all other felonies. *Hal. Pl.* 230.

Consequently, wheresoever clergy is not allowable in any other cases, it is taken away by some subsequent act of parliament. *Hal. Pl.* 230.

Consequently, where a statute makes a new felony, clergy is incident thereunto, unless it be specially taken away by such statute; but where it makes a new treason, there is no clergy. 2 *H. H.* 330.

And if it doth make a new felony, and takes away clergy not generally, but in such or such cases; regularly in other cases clergy is allowable: as if it take away clergy in case the party be convicted by verdict, yet he shall have his clergy if he stand mute. 2 *H. H.* 335.

But if it enacts generally, that it shall be felony without benefit of clergy; or that he shall suffer as in case of felony without benefit of clergy; this excludes it in all circumstances, and to all intents. 2 *H. H.* 335.

And where a statute ousteth clergy in case of felony, it is only so far ousted, and only in such cases, and to such persons, as are expressly comprised within such statutes; for in favour of life, and of the privilege of the clergy, such statutes are construed literally and strictly. 2 *H. H.* 335.

And therefore if clergy be ousted as to the principal, it is not ousted as to the accessary; if as to the accessary before, it is not extended to the accessary after; if where the prisoner is convict by verdict, it holds not as to a conviction by confession, nor as to an attainder by outlawry, nor to a standing mute. 2 *H. H.* 335.

And in all those cases wherein it is taken away, the indictment [190]

of such felony must bring the case within the particular provision of those statutes, which in such cases take away clergy; otherwise it is to be allowed, though upon the evidence it may fall out, that the truth of the fact appears to be such, as is within the special provision of those statutes that so take away clergy. 1 *H. H.* 517.

Clergy may be allowed, though not prayed.

4. If the offence be within clergy, though in strictness of law the prisoner ought to pray it, yet it is the duty of the judge to allow it, though not prayed; and that, as well after judgment as before. 2 *H. H.* 321.

Burning in the hand.

5. Every person *not being within orders*, which once hath been admitted to the benefit of his clergy eftsoons arraigned of any such offence, shall not be admitted to have the benefit of the clergy. And every person so convicted for murder, to be marked with an M. upon the brawn of the left thumb, and for any other felony with a T. by the gaoler openly in court before the judge, before that such person be delivered to the ordinary. And if any person at a second time of asking his clergy because he is within orders, hath not there ready his letters of orders, or a certificate of his ordinary witnessing the same; the justices before whom he is arraigned shall give him a day to bring in the same, which if he shall not do, he shall lose the benefit of his clergy as he shall do that is without orders. 4 *H.* 7. *c.* 13. (*m*)

But the king may pardon the burning in the hand, as well in an appeal, as upon an indictment. 3 *Inst.* 111.

And a clerk in holy orders shall not be burnt in the hand. 2 *Inst.* 637. 2 *H. H.* 389. [See *note* (2), *p.* 192.]

And he may have his clergy, in cases within clergy, a second time or oftener. 2 *H. H.* 389. (1)

Conviction for the second offence.

6. No man shall be ousted of his clergy a second time by the bare mark in his hand, or by a parol averment, without the record testifying it, or a transcript thereof according to the following statutes. 2 *H. H.* 373.

By the 34 & 35 *H.* 8. *c.* 14. The clerk of the crown, clerks of the peace, and clerks of assise for the time being, where any

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(*m*) By 19 *G.* 3. *c.* 74. § 3. The judge may inflict a fine, or order the offender [except in manslaughter] to be whipped; which shall have all the effects of burning on the hand.

(1) But he must produce his orders. 4 & 5 *H.* 7. *c.* 13. This, says Professor *Christian*, is a peculiar privilege of the clergy, that sentence of death can never be passed on them for any number of manslaughters, bigamies, simple larcenies, or other clergyable offences: but a layman, even if a peer, may be ousted of clergy, and will be subject to judgment of death on a second conviction of a clergyable offence; for if a layman has once been convicted of manslaughter, on production of the conviction he may afterwards suffer death for bigamy or other clergyable felony. 1 *Bla. Comm.* 377. *note* (2).

attainder, outlawry, or conviction of felony shall be had, shall within forty days if the term be then, if not, then within twenty days after the beginning of the term next following the said forty days, certify a transcript briefly and in a few words, containing the tenor and effect thereof, into the king's bench, there to remain for ever of record. And the clerk of the crown in the king's bench shall, at all such times as the justices of gaol delivery or justices of the peace in every county do write unto him for the names of such persons, certify to them without delay the names and surnames of the said persons, with the causes wherefore they were convict or attainted. But this not to extend to require certificates out of *Wales*, nor the counties of *Chester*, *Lancaster*, or *Durham*. [191

And by the 3 *W. c.* 9. § 7. Forasmuch as men who have once had their clergy, and women who have once had the benefit of the statute, may happen to be indicted for an offence committed afterwards in some other county; the clerk of the crown, clerk of the peace, or clerk of the assizes, where such person shall be convicted, shall at the request of the prosecutor or any other in the king's behalf, certify a transcript briefly and in few words, containing the effect and tenor of the indictment and conviction, of their having the benefit of the clergy or of the statute, and their additions, and the certainty of the felony and conviction, to the judges and justices in such other county; which certificate being produced in court, shall be a sufficient proof of their having had the benefit of the clergy or of the statute.

And it seems that if the prisoner deny that he is the same person, issue must be joined upon it, and it must be tried that he is the same person, before he can be ousted of clergy. 2 *H. H.* 373.

Offender how to be demeaned after clergy allowed.

7. By the 18 *Eliz. c.* 7. Persons admitted to their clergy, shall not be delivered to the ordinary, but after clergy allowed, and burning in the hand, shall forthwith be enlarged and delivered out of prison; or may by the judge be detained further in prison, not exceeding one year.

And by the 5 *An. c.* 6. Offenders burnt in the hand shall, at the discretion of the judge, be committed to the house of correction or public workhouse, not less than six months nor exceeding two years, to be kept to hard labour.

And by the 4 *G. c.* 11. § 1. Persons convicted of offences within the benefit of clergy (except persons convicted for buying or receiving stolen goods) instead of being burnt in the hand or whipt, may be transported for seven years.

Forfeiture on clergy allowed.

8. By the conviction, a person having had his clergy forfeiteth all his goods that he had at the time of the conviction, notwithstanding his burning in the hand. 2 *H. H.* 388.

Yet by burning in the hand he is put into a capacity of purchasing and retaining other goods. 2 *H. H.* 389.

And presently upon his burning in the hand, he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof. 2 *H. H.* 389.

[192] And although he be not burnt in the hand, but the king pardons it, he is thereby put in the same condition as if he were burnt in the hand, and rendered a person now capable to purchase and retain goods. 2 *H. H.* 389.

Not to be punished also in the spiritual court.

And consequently, after clergy and burning in the hand, he shall not be proceeded against by the ecclesiastical judge; for it amounts to a pardon by the king. 2 *H. H.* 389.

And although a clergyman in orders shall not be burnt in the hand, yet after his discharge he shall have the same privilege as if he had been burnt in the hand; and therefore shall not be drawn in question in the ecclesiastical court, to deprive him, or inflict any ecclesiastical censure upon him. 2 *H.H.* 389. 2 *Inst.* 637. (2)

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(2) When learning became more disseminated, and reading was no longer a competent proof of clerkship or being in holy orders, a distinction was drawn by stat. 4 *H.* 7. *c.* 13. between mere lay scholars and clerks who were really in orders. For by that act the first are to be burnt in the hand; and the latter, in order to be a second time admitted to clergy, must produce their letters of orders. This distinction was abolished for a time by 28 *H.* 8. *c.* 1. and 32 *H.* 8. *c.* 3. § 8., which imposed burning in the hand on clerks in orders: but is held to have been virtually restored by 1 *Ed.* 6. *c.* 12. § 10.; and clerks in orders claiming clergy are now subject to 4 & 5 *H.* 7. *c.* 13. (See *Hobart*, 294. 2 *Hal. P. C.* 375.) Thus all clerks in orders are, without any branding, and of course without any transportation, fine, or whipping (for those are only substituted in lieu of the other), to be admitted to this privilege, and immediately discharged, and this as often as they offend (4 *Bla. C.* 373. citing 2 *Hal. P. C.* 375.) This of course only extends to *clergyable* offences: thus peers and clergymen *before* 53 *G.* 3. *c.* 162. had no privilege in *petty larcenies*, and might be whipped, transported, or imprisoned and kept to hard labour, &c., though they were subject to no corporal punishment whatever on being convicted of a grand larceny or clergyable felony. See 4 *B. C.* 373. *n.* 3. But now by 53 *G.* 3. *c.* 162. the courts may sentence persons convicted before them *of felony with clergy or of grand or petit larceny*, to imprisonment with hard labour in addition to or without other sentence; and in either case their goods are forfeited.

By 1 *Ed.* 6. *c.* 12. § 14. Lords of parliament, and peers of the realm having place and voice in parliament, may have the benefit of their peerage equivalent to that of clergy for the first offence, although they cannot read, and without being burnt in the hand for all offences then clergyable to commoners, and also for the crimes of house-breaking, highway-robbery, horse-stealing, and robbing churches.—On the *Duchess of Kingston*'s conviction for bigamy, it

10. And it seemeth, that it restores the party to his credit; and consequently enables him to be a good witness. 2 *Haw.* 364. Restored to his credit.

And it is holden, that after a man is admitted to his clergy, it is actionable to call him felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. 2 *Haw.* 365. (*n*)

Bible. See **Church.**

Bier. See **Church.**

Bigamy.

[See **Polygamy.**]

BIGAMI are they who have married two wives or more successively, or one widow. 2 *Inst.* 273. *Gibs.* 423. (*o*)

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was held, that a peeress convicted of a clergyable felony ought to be immediately discharged without being burnt in the hand, or liability to imprisonment. 11 *Harg. St. Tr.* 264. And this though it was argued that as the privilege of peerage under 1 *Ed.* 6. *c.* 12. was only an extension of the benefit of clergy, and therefore only granted to those who were or might be entitled to that benefit, it was not the intention of the legislature to grant such privilege to females, who were not at that time entitled to clergy; which was first given them in particular instances by 21 *J.* 1. *c.* 6., but not generally before 3 *W.* & *M.* *c.* 9. § 6.

(*n*) By the civil law clergy is never allowed; so that pirates on the high seas had not the benefit of it. *Moor*, 756. [Till now by 1 *G.* 4. *c.* 90. § 1. Every person who shall be tried for any capital offence committed upon the sea, out of the body of any county of this realm, and within the jurisdiction of the admiralty, by virtue of any commission directed under 28 *H.* 8. *c.* 15., and shall be found guilty of any crime, which if committed on land would be clergyable, shall be entitled to his clergy in respect thereof in like manner and be subject to like punishment as if he had committed such offence on the land. And by § 2. All offences mentioned in 43 *G.* 3. *c.* 58. against cutting and maiming, which shall be committed on the high seas, out of the body of any county of this realm, shall be offences of the same nature respectively, and be liable to the same punishments as if committed on land in *England* or *Ireland*, and shall be enquired of as treasons, felonies, &c. under 28 *H.* 8. *c.* 15. are to be.]

(*o*) *Bigami* are properly they who have successively married two wives; but *Lindwood* reckons up seven constructive sorts of bigamy; *p.* 129. By the canon law, a bigamist, and he who married a widow, or a woman divorced from her husband, or a prostitute, or two sisters, or his first cousin, was incapable of filling the sacerdotal

4 *Ed.* 1. *st.* 3. *c.* 5. Concerning men twice married, called *bigami*, whom the bishop of Rome by a constitution made at the council of Lyons hath excluded from all clerks privilege, whereupon certain prelates (when such persons have been attainted for felony) have prayed for to have them delivered as clerks, which were made *bigami* before the same constitution; it is agreed and declared before the king and his council, that the same constitution shall be understood in this wise, that whether they were *bigami* before the same constitution or after, they shall not be delivered to the prelates, but justice shall be executed upon them, as upon other lay people. (*p*)

18 *Ed.* 3. *st.* 3. *c.* 2. If any clerk be arraigned before our justices at our suit, or at the suit of the party, and the clerk holdeth him to his clergy, alleging that he ought not before them thereupon to answer; and if any man for us or for the same party will suggest, that he hath married two wives or one widow, that upon the same the justices shall not have the cognizance or power to try the bigamy by inquest or in other manner; but it shall be sent to the spiritual court, as hath been done in times past in case of bastardy. And till the certificate be made by the ordinary, the party in whom the bigamy is alleged shall abide in prison if he be not mainpernable.

1 *Ed.* 6. *c.* 12. § 16. Every person who by any statute or law of this realm ought to have the benefit of clergy, shall be allowed the same although he hath been divers times married to any single woman or single women, or to any widow or widows, or to two wives or more.

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[194]

Bishops.

FOR bishops' *leases*, together with those of other ecclesiastical corporations, whether sole or aggregate; see tit. Leases.

I. *Of archbishops and bishops in general.*

office. *Can. sanct. Apost.* 16, 17, 18. *Dist.* 55. *c.* 1. and 2. X. 1. 21. *De Bigamis non ordinandis.* Lindw. 128. At last, *Gregory* the 10th, in the council of Lyons, A.D. 1274., declared bigamists *ipso facto* stripped of their privilege of clergy, and subject to the secular authority. 6 *Decretal.* 1. 12. [This canon being adopted and explained in England by 4 *Ed.* 1. *st.* 3. *c.* 5.] bigamy became no uncommon counterplea to the claim of clergy. 4 *Bl. Com.* 163. in the *note*.

(*p*) This statute was passed two years after the council of Lyons, *viz.* in 1276, and is a parliamentary declaration of the constitution there made. This, lord *Coke* says, the judges required, because that constitution took from bigamists their clergy, and therefore their lives. 2 *Inst.* 274.

II. *Form and manner of making and consecrating archbishops and bishops.*

III. *Concerning residence at their cathedrals.*

IV. *Concerning their attendance in parliament.*

V. *Spiritualties of bishoprics in the time of vacation.*

VI. *Temporalties of bishoprics in the time of vacation.*

VII. *Archbishops' jurisdiction over their provincial bishops.*

VIII. *Of suffragan bishops.*

IX. *Of coadjutors.*

I. *Of archbishops and bishops in general.*

1. By the preface to the form and manner of making, ordaining, and consecrating of bishops, priests and deacons, (confirmed by act of parliament, 3 & 4 *Ed.* 6. *c.* 10. 5 & 6 *Ed.* 6. *c.* 1.) 8 *El. c.* 1. 13 & 14 *C.* 2. *c.* 4.) every man which is to be ordained or consecrated bishop, shall be full thirty years of age. (*q*) Age of persons to be made bishops.

2. Bishop is from the Saxon *biscop*, and that from the Greek επισκοπος, an overseer or superintendant; so called from that watchfulness, care, charge, and faithfulness, which by his place and dignity he hath and oweth to the church. *God.* 22. (*r*) Bishop, what.

3. An archbishop is the chief bishop of the province, who, next and immediately under the king, hath supreme power, authority, and jurisdiction, in all causes and things ecclesiastical. *God.* 12. Archbishop.

At first, the title of *archbishop* seemeth to have been only a name of honour: whence in some countries, especially in Italy, several are distinguished with that title, who indeed take place of, but have no power or authority over, other bishops. *Bower's Hist. Pop.* V. 1. *p.* 110. [195]

Metropolitan was a title given to the bishop of the *chief city* of a province. *Id.*

As was likewise that of *primate*: he being *primus*, or the first of the province: for such was the original signification of that word in an ecclesiastical sense; but in process of time, the title of primate was restrained to the bishops of some great cities. *Id.*

A *patriarch* was the chief bishop over several kingdoms or provinces, as an archbishop is of several dioceses. *God.* 20.

(*q*) The reason given by the canon law is, that our saviour was baptized, and began to preach at this age. *Dist.* 78. *cap.* 3.

(*r*) See *Dist.* 21. *c.* 1.

Constitution of the state ecclesiastical.

The ancient Britons are believed to have had at least one archiepiscopal see before the time of Austin the Monk, *viz.* at Caerleon on (as some would have it) at Landaffe. *Johns.* 35. *God.* 17.

And upon the pope's granting unto Austin a power to erect a metropolitan see at York (with subordination nevertheless to himself, as primate), Dr. *Warner* observeth, that the reason of this preference with regard to York was, because formerly under the Romans York had been an archbishopric, as well as London and Caerleon. 1 *Warn. Eccl. Hist.* 50.

But at this day, the ecclesiastical state of England and Wales is divided only into two provinces or archbishoprics, to wit, *Canterbury* and *York*. Each archbishop hath within his province bishops of several dioceses. The archbishop of *Canterbury* hath under him within his province, of ancient foundations, *Rochester*, *London*, *Winchester*, *Norwich*, *Lincoln*, *Ely*, *Chichester*, *Salisbury*, *Exeter*, *Bath* and *Wells*, *Worcester*, *Coventry* and *Litchfield*, *Hereford*, *Landaffe*, *St. David's*, *Bangor*, and *St. Asaph*; and four founded by king Hen. 8. erected out of the ruins of dissolved monasteries, *viz. Gloucester*, *Bristol*, *Peterborough*, and *Oxford*. The archbishop of *York* hath under him four, *viz.* the bishop of the county palatine of *Chester*, newly erected by king Hen. 8. and annexed by him to the archbishopric of *York* (3): the county palatine of *Durham*; *Carlisle*; and the Isle of *Man*, annexed to the province of *York*, by king Hen. 8. But a greater number this archbishop anciently had, which time hath taken from him. 1 *Inst.* 94.

[196] Every diocese is divided into archdeaconries, whereof there be sixty: and every archdeaconry is parted into deaneries; and deaneries again into parishes, towns, and hamlets. 1 *Inst.* 94.

But this division into parishes seemeth not to have been made all at once, but by degrees, as churches from time to time were built and endowed by lords of manors and others, for the use of their tenants or other inhabitants within such a district; and this seemeth to be the reason why there are some places at this day which are not in any parish, but are extraparochial.

Every bishop, many centuries after Christ, was universal incumbent of his diocese, received all the profits, which were but offerings of devotion, out of which he paid the salaries of such as officiated under him, as deacons and curates in places appointed. *God.* 23.

Afterwards, when churches became founded and endowed, he sent out his clergy to reside, and to officiate in those churches; reserving nevertheless to himself a certain number in his cathedral to counsel and assist him, which are now called deans and prebendaries or canons.

(3) Stat. 33 *H.* 8. *c.* 31. dissevers the bishopric of Chester and the Isle of Man from the jurisdiction of Canterbury to that of York.

5. Canterbury was once the royal city of the kings of Kent; and was given by king Ethelbert, on his conversion to christianity, to Austin the first archbishop thereof, about the year of our Lord 598. *God.* 13. 17. **Archbishop of Canterbury.**

If we consider Canterbury as the seat of the metropolitan, it hath under it twenty-one bishops (as hath been said): but if we consider it as the seat of a diocesan, so it comprehends only some part of Kent (the residue being in the diocese of Rochester), together with some other parishes dispersedly situate in several dioceses; it being an ancient privilege of this see, that the places where the archbishop hath any manors or advowsons, are thereby exempted from the ordinary, and are become peculiars of the diocese of Canterbury, properly belonging to the jurisdiction of the archbishop of Canterbury. *God.* 14.

The archbishop of Canterbury is styled primate and metropolitan of *all* England, albeit there is another archiepiscopal province within the realm; partly, because when the popes had taken into their own hands, in a great measure, the archiepiscopal authority, they invested the archbishops of Canterbury with a legatine authority throughout both the provinces; and partly, because the archbishop of Canterbury hath still the power, which the popes in times past usurped, and which by act of parliament was again taken from the popes, of granting faculties and dispensations in both the provinces alike.

Yea further, the archbishop of Canterbury anciently had primacy not only over all England but over Ireland also, and from him the Irish bishops received their consecration: for Ireland had no other archbishop till the year 1152. For which reason it was declared in the time of the two first Norman kings, that Canterbury was the metropolitan church of England, Scotland, and Ireland, and of the isles adjacent: the archbishop of Canterbury was therefore sometimes styled a *patriarch*, and *orbis Britannici pontifex*; insomuch that matters recorded in ecclesiastical affairs did run thus, viz. *anno pontificatus nostri primo, secundo*, &c. *God.* 20. [197]

At general councils abroad, the archbishop of Canterbury had the precedency of all other archbishops. *God.* 21.

At home he hath the privilege to crown the kings of England. *God.* 13.

He is said to be *inthroned*, when he is vested in the archbishopric; whereas bishops are said to be *installed*. *God.* 21.

He hath prelates to be his officers; thus, the bishop of London is his provincial dean: the bishop of Winchester, his chancellor; the bishop of Lincoln anciently was his vice-chancellor; the bishop of Salisbury, his precentor; the bishop of Worcester, his chaplain; and the bishop of Rochester (when time was) carried the cross before him. *God.* 14.

He may retain and qualify eight chaplains; which is more by two, than any duke is allowed to do by statute. *God.* 14.

In speaking and writing to him is given the title of *grace, and most reverend father in God.* Champ. Pr. St. 63.

He writes himself *by divine providence;* whereas bishops only use *by divine permission.* God. 13. (4)

Archbishop of York.

6. The first archbishop of York that we read of, was Paulinus, who by pope Gregory's appointment was made archbishop there, about the year of our Lord 622. *God.* 12.

The province of York anciently claimed and had a metropolitan jurisdiction over all the bishops of Scotland, whence they had their consecration, and to which they swore canonical obedience, until about the year 1466, when George Nevil being at that time archbishop of York, the bishops of Scotland withdrew themselves from their obedience to him; and in the year 1470, pope Sextus the fourth created the bishop of St. Andrews archbishop and metropolitan of all Scotland. *God.* 14. 18.

[198] The archbishop of York hath the privilege to crown the queen consort; and to be her perpetual chaplain. *Chamb.* 65.

He also, in like manner as the archbishop of Canterbury, is said to be *inthroned* when he is vested in the archbishopric. *God.* 21.

And he may retain and qualify eight chaplains; whereas a bishop can only qualify six. *God.* 21.

He also hath the title of *grace* and *most reverend father in God;* whereas bishops have the title of *lord* and *right reverend father in God.* Chamb. 65.

And he writes himself *by divine providence.* God. 13.

Their precedence in the state.

7. The archbishop of Canterbury is the first peer of the realm, and hath precedency, not only before all the other clergy, but also, (next and immediately after the blood royal) before all the nobility of the realm; and as he hath the precedency of all the nobility, so also of all the great officers of state. *God.* 13.

The archbishop of York hath the precedency over all dukes, not being of the blood royal; as also before all the great officers of state, except the lord chancellor. *God.* 14.

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(4) By 25 *Hen.* 8. *c.* 21. The archbishop of Canterbury has the power of granting dispensations in any case not contrary to the Holy Scriptures and law of God, where the pope used formerly to grant them, which is the foundation of his granting special licences to marry at any place or time, to hold two livings, and the like: and in this also is founded the right he exercises of conferring degrees in prejudice of the two universities. 1 *Bla. Comm.* 381. and see Dispensation. But a Lambeth degree does not qualify for dispensation to hold a plurality within 21 *Hen.* 8. *c.* 13. § 23. which is confined to the degrees conferred by the two universities. 1 *Bla. Comm.* 387. *note* (14) *by Christian.*

And every other bishop, in respect of his barony, hath place of all the barons of the realm, under the degree of viscounts. *God.* 13.

8. The archbishop of Canterbury hath the precedency of all the other clergy; next to him the archbishop of York; next to him the bishop of London; next to him the bishop of Durham; next to him the bishop of Winchester; and then all the other bishops of both provinces after the seniority of their consecration; but if any of them be a privy-councillor, he shall take place next after the bishop of Durham. 1 *Inst.* 94. 1 *Ought.* 486. Their precedence one amongst another.

9. By the 25 *Ed.* 3. *st.* 5. *c.* 2. it is thus enacted: Moreover, there is another manner of treason, where a man secular or religious *slayeth his prelate, to whom he oweth faith and obedience.* Petty treason for a clerk to kill his prelate.

Another manner of treason] The first part of this statute is concerning high treason: so called in respect of the royal majesty against whom it is committed. And the sort of treason spoke of in this clause is called petit treason, in regard it is committed only against subjects. 3 *Inst.* 20.

Slayeth his prelate] And this was petit treason at the common law. 3 *Inst.* 20.

To whom he oweth faith and obedience] Petit treason doth presuppose a trust and obedience in the offender of one kind or another. 3 *Inst.* 20.

[9. *a.* Prelates are included by name in the statutes which give the actions *de scandalis magnatum.* 2 Ric. 2. c. 5. 12 Ric. 2. c. 11.]

II. *Form and manner of making and consecrating archbishops and bishops.* [199]

1. When cities were at first converted to Christianity, the bishops were elected by the clergy and people: for it was then thought convenient, that the laity, as well as the clergy, should be considered in the election of their bishops, and should concur in the election; that he, who was to have the inspection of them all, might come in by general consent. *Ayl. Par.* 126. Bishoprics at first elective by the clergy and the people.

2. But as the number of Christians increased, this was found to be inconvenient: for tumults were raised, and sometimes murders committed, at such popular elections: and particularly, at one time, no less than three hundred persons were killed at such an election. *Id.* Then donative by the prince.

To prevent the like disorders, the emperors being then Christians, reserved the election of bishops to themselves; but in some measure conformable to the old way, that is to say, upon a bishop's death, the chapter sent a *ring* and *pastoral staff* to the emperor, which he delivered to the person whom he appointed to be bishop of that place. *Id.*

But the pope, or bishop of Rome, who in process of time got to be the head of the church, was not pleased that the bishops should have any dependance upon princes; and therefore brought it about, that the canons in cathedral churches should have the election of their bishops; which elections were usually confirmed at Rome. *Ayl. Par.* 126.

But princes had still some power in those elections. And particularly in England, we read, that in the Saxon times, all ecclesiastical dignities were conferred by the king in parliament. *Ingulphus*, abbot of Crowland, in the time of William the conqueror, tells us, that for many years past there had been no canonical election of prelates, for that they were donative by delivery of the ring and pastoral staff: the one signifying, that the bishop was wedded to the church: and the other was an ensign of honour, always carried before him, and was a token of that support which he ought to contribute to the church, or rather that he was now become a shepherd of Christ's flock. *Id.*

Lord *Coke* established the right of donation in the kings of this realm, upon the principle of foundation and property: for that all the bishoprics in England were of the king's foundation, and thereupon accrued to him the right of patronage. 1 *Inst.* 134. 344.

[200] So also the bishoprics in Wales were founded by the prince of Wales; and the principality of Wales was holden of the king of England as of his crown; and when the principality of Wales for treason and rebellion was forfeited, the patronages of the bishoprics there became annexed to the crown of England. 1 *Inst.* 97.

And in Ireland, the bishoprics are still donative by letters patent at this day. 1 *Salk.* 136.

The proprietor of the Isle of Man is patron of the bishopric there; but the archbishop of York doth not consecrate him, till the broad seal of the king's consent be produced. *Johns.* 29.

Next elections by the deans and chapters, subject to the pope's confirmation.

3. Hildebrand, who was pope in the reign of king William the conqueror, was the first who opposed this way of making bishops here; and for that purpose he called a council of 110 bishops, and excommunicated not only the emperor Henry 4. but also all prelates whatsoever that received investiture at the hands of the emperor or of any layman by delivery of the ring and staff. *Ayl. Parerg.* 126.

But notwithstanding that excommunication, Lanfrank was made archbishop of Canterbury at the same time, and by the same means, according to *Malmesbury*; but the Saxon annals in *Bennet's* college library are, that he was chosen by the senior monks of that church, together with the laity and clergy of England, in the king's great council. *Id.*

Howbeit, Anselem did not scruple to accept the archbishopric by delivery of the ring and staff, at the hands of William Rufus;

though never chosen by the monks of Canterbury. And this was the man, who afterwards contested this matter with king Henry I. in a most extraordinary manner. For that king being forbidden by the pope to dispose of bishoprics as his predecessors had done by delivery of the ring and staff, and he not regarding that prohibition, but insisting on his prerogative, the archbishop refused to consecrate those bishops whom the king had appointed. At which the king was so much incensed, that he commanded the archbishop to obey the ancient customs of the kings his predecessors, under pain of being banished the kingdom. This contest grew so high, that the pope sent two bishops to acquaint the king that he would connive at this matter, so long as he acted the part of a good prince in other things. Whereupon the king commanded the archbishop to do homage, and to consecrate those bishops whom the king had made; but this being only a feigned message to keep fair with the king, and the [201]
archbishop having received a private message to the contrary, the archbishop still disobeyed the king. And at length the king was forced to yield up the point, reserving only the ceremony of homage to himself to the bishops, in respect of the temporalties. *Id.*

And king John afterwards, after several contests, by his charter, acknowledging the custom and right of the crown in former times, yet granted by common consent of the barons, that the bishops should be eligible by the chapter; which after was confirmed by divers acts of parliament. Which election by the chapter was to be a free election, but founded withal upon the king's *conge d'eslire*; and afterwards to have the royal assent; and the new-elected bishop was not to have his temporalties restored, until he had sworn allegiance to the king; but it was agreed, that confirmation and consecration should be in the power of the pope; by which means he gained in effect the disposal of all the bishoprics in England. 1 *Inst.* 134. *Gibs.* 104. 3 *Salk.* 71.

But neither was he content with this power only of confirmation and consecration, but would oftentimes collate to the bishoprics himself: whereupon by the statute of the 25 *Ed.* 3. *st.* 6. it was enacted as followeth; viz. The free election of archbishops, bishops and all other dignities and benefices elective in England, shall hold from henceforth in the manner as they were granted by the king's progenitors and the ancestors of other lords, founders of the said dignities and other benefices. And in case that reservation, collation, or provision be made by the court of Rome, of any archbishopric, bishopric, dignity, or other benefice, in disturbance of the free elections aforesaid; the king shall have for that time the collations to the archbishoprics and other dignities elective which be of his advowry; such as his progenitors had before that free election was granted; since that the

election was first granted by the king's progenitors upon a certain form and condition as to demand licence of the king to choose, and after the election to have his royal assent, and not in other manner; which conditions not kept, the thing ought by reason to resort to its first nature. § 3.

Then elective by the deans and chapters, (without the pope,) by the king's sole nomination.

4. Afterwards, by the 25 *H.* 8. *c.* 20. All papal jurisdiction whatsoever in this matter was entirely taken away; by which it is enacted, that no person shall be presented and nominated to the bishop of Rome, otherwise called the pope, or to the see of Rome, for the office of an archbishop or bishop; but * the same shall utterly cease, and be no longer used within this realm. § 3.

*[202]

And the manner and order as well of the election of archbishops and bishops, as of the confirmation of the election, and consecration, is clearly enacted and expressed by that statute.

Then donative by the king alone, without election.

5. Afterwards, by the statute of the 1 *Ed.* 6. *c.* 2. all bishoprics were made donative again, as formerly they had been; by which it was enacted as followeth: Forasmuch as the elections of archbishops and bishops by the deans and chapters, be as well to the long delay as to the great cost and charges of such persons as the king giveth any archbishopric or bishopric unto: and whereas the said elections be in very deed no elections, but only by a writ of *conge d'eslire* have colours, shadows or pretences of elections, serving nevertheless to no purpose, and seeming also derogatory and prejudicial to the king's prerogative royal, to whom only appertaineth the collation and gift of all archbishoprics and bishoprics and suffragan bishops within his dominions; it is enacted, that from thenceforth no *conge d'eslire* be granted, nor election by the dean and chapter be made, but that the king by his letters patents may collate.

And it hath been supposed by some, that the principal intent of this act was to make deans and chapters less necessary; and thereby to prepare the way for a dissolution of them. *Gibs.* 113.

Finally elective again by the dean and chapter, under the king's nomination.

6. But this statute was afterwards repealed (5), and the matter was brought back again, and still resteth upon the statute of the 25 *H.* 8. *c.* 20. (as hereafter followeth). 12 *Co.* 8.

7. When a bishop dies or is translated, the dean and chapter

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(5) It was confirmed 8 *El. c.* 1. § 5. and repealed 1 *M. sess.* 2., *c.* 2., which is repealed 1 *J.* 1. *c.* 25. § 48. It now seems expired since 25 *H.* 8. *c.* 20. is revived by 1 *El. c.* 1. § 7. See 12 *Rep.* 7. *Co. Lit.* 134 *a.*

A bishopric in Ireland is donative by letters patent, without *conge d'eslire* at this day (*Bishop of St. David's* v. *Lucy*, 1 *Salk.* 136. *Palmer*, 27.); and this as well before as after stat. 2 *Eliz.* (*Ir.*), which, in affirmation of the common law, gives the sovereign power so to create a bishop. *Brian* v. *Knivan*, *Cro. Jac.* 552. A bishop of Ireland or Man has the title of bishop here, as being a bishop of the universal church. *Palm.* 345.

certify the king thereof in chancery, and pray leave of the king to make election. *God.* 29.

Notice of the avoidance.

8. Upon which it is enacted, by the 25 *H.* 8. *c.* 20. That at every avoidance of any archbishopric or bishopric, the king may grant to the dean and chapter a licence under the great seal, as of old time hath been accustomed, to proceed to election of an archbishop or bishop. § 4.

Leave to elect.

Which licence is called in French *conge d'eslire*, that is, leave to choose. *Terms de la ley.*

9. And with the licence, a letter missive; containing the name of the person which they shall elect and choose. 25 *H.* 8. *c.* 20. § 4.

Nomination of the person to be elected.

10. By virtue of which licence, the dean and chapter shall with all speed in due form elect and choose the said person named in the letters missive, and none other. 25 *H.* 8. *c.* 20. § 4.

Election.

And if they delay their election above twelve days next after such licence or letters missive to them delivered, the king shall nominate and present, by letters patent under the great seal, such person as he shall think convenient, to be invested and consecrated in like manner as if he had been elected by the dean and chapter. § 4, 5. [203

11. After election, then there must be the consent of the person elected: in order to which, the proctor, constituted by the dean and chapter, exhibits to him the instrument of election, and prayeth his assent to the same: which assent is to be given by an instrument in form, in the presence of a notary public. *Gibs.* 110.

Consent of the person elected.

12. And if the said dean and chapter do elect within twelve days as aforesaid, then they shall make certification thereof to the king under their common seal: after which certification, the person so elected shall be reputed and taken by the name of lord elected of the said dignity and office that he shall be elected to. 25 *H.* 8. *c.* 20. § 5.

Notification of the election.

And if the dean and chapter, after such licence shall be delivered to them, proceed not to election, and signify the same according to the tenor of this act, within twenty days next after such licence comes to their hands; or if any of them admit or do any other thing contrary to this act, then every such dean and particular person of the chapter so offending, and every of their aiders, counsellors and abettors shall incur a *præmunire.* § 7.

13. And then making *such oath and fealty only to the king* as shall be appointed for the same, the king, by letters patents under his great seal shall signify the said election, if it be to the dignity of a bishop, then to the archbishop of the province, if the see of the said archbishop is full and not void; and if it be void, then to any other archbishop within this realm or in any other the king's dominions, requiring and commanding him to confirm the said election, and to invest and consecrate the person so elected

Mandate for confirmation.

to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies and other things requisite for the same, without suing to the see of Rome in that behalf: And if the person be elected to the dignity of an archbishop, then the king shall so signify the said election to one archbishop and two other bishops, or else to *four bishops* within this realm or in any other the king's dominions, requiring and commanding them, with all speed and celerity, to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give
[204] and use to him such *pall* benedictions, ceremonies and all other things requisite to the same, without suing to the see of Rome in that behalf. 25 *H.* 8. *c.* 20. § 5.

Such oath and fealty only to the king] Instead of this, before the reformation, an oath was taken to the pope and see of Rome, in these words: "I John, bishop of P. from this hour forward "shall be faithful and obedient to St. Peter, and to the holy "church of Rome, and to my lord the pope and his successors "canonically entering. I shall not be of counsel nor consent, "that they shall lose either life or member, or shall be taken or "suffer any violence or any wrong by any means. Their counsel "to me credited by them, their messengers or letters, I shall not "willingly discover to any person. The papacy of Rome, the "rules of the holy fathers and the regality of St. Peter, I shall "help and maintain and defend against all men. The legate of "the see apostolic, going and coming, I shall honourably en-"treat. The rights, honours, privileges and authorities of the "church of Rome, and of the pope and his successors, I shall "cause to be conserved, defended, augmented and promoted. "I shall not be in counsel, treaty, or any act in the which any "thing shall be imagined against him or the church of Rome, "their rights, seats, honours or powers. And if I know any "such to be moved or compassed, I shall resist it to my power, "and as soon as I can, I shall advertise him, or such as may "give him knowledge. The rules of the holy fathers, the de-"crees, ordinances, sentences, dispositions, reservations, pro-"visions and commandments apostolic, to my power I shall "keep, and cause to be kept of others. Heretics, schismatics "and rebels to our holy father and his successors, I shall resist "and persecute to my power. I shall come to the synod when "I am called, except I be letted by a canonical impediment. "The thresholds of the apostles I shall visit yearly personally, "or by my deputy. I shall not alienate or sell my possessions "without the pope's counsel. So God help me and the holy "evangelists." 1 *Burnett's Hist. Reform.* 128.

It is true an oath was also taken to the king, which had a shew of qualifying the oath to the pope: beginning thus: "I John,

"bishop of P. utterly renounce and clearly forsake all such "clauses, words, sentences and grants, which I have or shall "have hereafter of the pope's holiness, of or for the bishoprick "of P. that in anywise hath been, is, or hereafter may be "hurtful or prejudicial to your highness, your heirs, successors, [205] "dignity, privilege, or estate royal." [And the rest is an oath of obedience to the king in temporal matters.] 1 *Burnett's Hist. Reform.* 124.

And the inconsistency of these two engagements seems to be what Wm. Rufus declared in his time, in the case of archbishop Anselm, that he could not possibly observe at the same time both the fidelity which he owed to him, and his obedience to the apostolick see. *Gibs.* 117.

Four bishops] That is, four at the least. *Gibs.* 111.

Pall] So that the form of consecrating according to the Roman pontifical (though without bulls from Rome) seems to have continued after the making of this act, viz. all Henry the eighth's reign, and till the establishment of the new form, in the third year of *Ed.* 6. *Gibs.* 110.

Confirmation.

14. The method and order of confirmation will be best understood by a brief account of the several instruments exhibited and applied in the course of it:

(1) The king's letters patent; by which the royal assent to the election is signified, and the archbishop required to proceed to confirmation.

(2) A citation against opposers; which (the time of confirmation being first fixed) is published and set up, by order and in the name of the archbishop, at the church where it is to be held: as well to notify the day of confirmation, as to cite all opposers (if any there be) who will object against the said election, or the person elected, to appear on that day, according to the direction of the ancient canon law.

(3) The certificate or return made by the proper officer to the archbishop, of the due execution of the said citation.

(4) The commission to confirm; which is usually performed by the archbishop's vicar general.

(5) The proxy of the dean and chapter; by which one or more persons are delegated by the dean and chapter electing, not only to present in their names the instrument of election to the bishop elected to obtain his consent, and to present the letters certificatory of election to the king, and to pray the royal assent in order to confirmation; but also at the time of confirmation (the said letters patents and commission to exhibit such, his proxy being first read) in virtue thereof to present the bishop elected to the archbishop, vicar general or surrogate; and in the course of the confirmation, to do whatever else is necessary to [206] be done on the part of the dean and chapter.

(6) The first schedule: The said proctor in the name of the dean and chapter, exhibiting the citation and return abovementioned, prays that the opposers (if any be) not appearing, may be pronounced contumacious, and precluded from further opposition, and that the confirmation may be proceeded in; which is accordingly done by this schedule.

(7) A summary petition: This is the petition of the said proctor, that the bishop elect may be confirmed, upon his alleging and proving the regularity of the election, and the merits of the person elected; which he doth in nine articles; setting forth, First, that the see was vacant, and had been vacant for some time. Secondly, that the dean and chapter, having first desired and obtained the royal licence, appointed a day for election, and duly summoned all persons concerned. Thirdly, that on that day, they unanimously chose the person now to be confirmed. Fourthly, that the election was duly published and declared to the clergy and people there assembled. Fifthly, that at the request of the dean and chapter, the person so elected gave his consent to the election. Sixthly, that the person elected is sufficiently qualified by age, knowledge, learning, orders, sobriety, condition, fidelity to the king, and piety. Seventhly, that the dean and chapter, under their seal, intimated the election, and the name of the person elected to the king. Eighthly, that the king had given the royal assent. Ninthly, that he had, by his letters patent, required the person elected to be confirmed.

All which articles conclude with a petition, that in pursuance of the premises, confirmation may be decreed.

Then the summary petition is admitted, and the court decrees to proceed thereupon, and assign him a term immediate, to prove the particular matters contained in the petition; for proof of which he exhibits the process of the election made by the dean and chapter, the consent of the archbishop or bishop, and the royal assent; and then prays a time to be presently assigned for final sentence; which is decreed accordingly.

(8) The second schedule: Before sentence, a second praeconization of the opposers (if any be) is made at the fore-door of the church, and (none appearing) they are declared contumacious, by a second schedule.

[207] But if any appear, it seemeth that they shall be admitted to make their exceptions in due form of law. To which purpose, a passage in Collier's ecclesiastical history, vol. 2. page 745. is applicable. "Soon after the recess of the parliament, bishop Laud was translated from Bath and Wells to London, and Mountague promoted to the see of Chichester. Before he was consecrated, an unexpected rub was thrown in the way. At the confirmation of bishops, there is public notice given, that if any persons can object either against the party elected, or the

legality of the election, they are to appear and offer their exceptions at the day prefixed. This intimation being given, one *Jones*, a bookseller, attended with the mob, appearing at the confirmation, excepted against Mountague, as a person unqualified for the episcopal dignity. And to be somewhat particular, he charged him with popery, arminianism, and other heterodoxies, for which his books had been censured in the former parliament. But Dr. *Rives*, who then officiated for Brent, the vicar general, disappointed this challenge. For Jones had made some material omissions in the *manner*, and not offered his objections in form of law. Particularly, the exceptions were neither given in writing, nor signed by an advocate, nor presented by any proctor of the court. Upon the failure of these circumstances, the confirmation went on." The parliament, not at first apprized in point of form, were dissatisfied with the conduct of the vicar general, and inquired into the behaviour of Dr. Rives on that occasion.——Upon which it hath been observed, That Dr. Rives, a most eminent civilian and canonist, admitted that the opposition was good and valid, had it been legally offered; and that the parliament of that time proceeded upon the same opinion.

(9) The oaths: These are four in number: two (viz. the oaths of allegiance and supremacy) in conformity to the statutes of the realm; and two others, (viz. the oaths of simony and of obedience to the archbishop,) in conformity to the rules and canons of the church. (*s*)

(10) The definitive sentence, or the act of confirmation; by which the judge committeth to the bishop elected, the care, governance, and administration of the spiritualties: and then decrees him to be installed or inthronized. *Gibs.* 110, 111. [208]
God. 25, 26, 27.

And this is performed (in the province of Canterbury) by mandate from the archbishop to the archdeacon of Canterbury; to whom the right of installing the bishops of that province hath anciently belonged, and doth still belong. *Gibs.* 118.

(11) Finally, a public notary, by the archdeacon's command, records the whole matter of fact in this affair, in an instrument to remain as authentic to posterity. *God.* 27.

After election and confirmation, and not before, the bishop is fully invested to exercise all spiritual jurisdiction. *Gibs.* 111. But he may not sue for his temporalties till after consecration. *Wats. c.* 40. *p.* 423.

15. Upon a *translation;* all the aforesaid ceremonies are observed: but *consecration* in that case is not requisite, because Consecration.

(*s*) For the two first oaths, see tit. Oaths, 20.; for the 3d. Simony, 4.; and for the last, 15. of this title.

the bishop was consecrated before. (6) *God.* 29. *Gibs.* 111. But in the case of *creation*, the process goeth on as followeth:

The consecration shall always be performed upon some Sunday or holiday. *Form of consecr.*

As to the *place* of consecration; the dean and chapter of Canterbury claim it as an ancient right of that church, that every bishop of the province is to be consecrated in it, or the archbishop to receive from them a licence to consecrate elsewhere. And we are assured, that a long succession of licences to that purpose are regularly entered in the registry of that church. And although between the years 1235 and 1300, that point was controverted with the chapter, it ended in their favour and in the further confirmation of the privilege, which was first granted by Thomas Becket, and afterwards confirmed by St. Edmund. And in Cranmer's register there is a memorandum, that no bishop may be consecrated without the church of Canterbury, but by the special licence of the dean and chapter of Canterbury under the chapter seal. *Gibs.* 111.

In order for consecration, the archbishop (or some other bishop appointed) shall begin the communion service: another bishop shall read the epistle; and another bishop shall read the gospel. And after the Nicene creed and sermon, the elected bishop, vested with his rochet, shall be presented by two bishops unto the archbishop of that province, or to some other bishop appointed by lawful commission. *Form of consecr.*

[209] Then shall the archbishop demand the king's mandate for the consecration, and cause it to be read (as in times past the *pope's* mandate was in like manner demanded, as is required in the pontifical). *Form of consecr.*

And the oaths of allegiance and supremacy shall be ministered to the persons elected. *Form of consecr.* 1 *Will. c.* 8.

And then shall also be ministered unto them the oath of due obedience to the archbishop, as followeth: "In the name of "God, amen. I N. chosen bishop of the church and see of P. "do profess and promise all due reverence and obedience to "the archbishop, and to the metropolitical church of C. and to "their successors: so help me God, through Jesus Christ."—But this oath shall not be made at the consecration of an archbishop. *Form of consecr.*

To the archbishop and to the metropolitical church]. That is, either when the see is full; or else in the vacation, when the whole archiepiscopal jurisdiction is vested in the dean and chapter. *Gibs.* 117.

Then after divers questions and answers touching the episcopal

(6) *Jones*, 160. *Evans and another* v. *Askwith.*

office, and before the act of consecration, the bishop elect shall put on the rest of the episcopal habit. *Form of consecr.*

According to the office in the 3 *Ed.* 6. the *pastoral staff* was delivered to the bishop; which delivery in the Roman pontifical is preceded by a consecration of the staff; and followed by the consecration and putting on of a *ring*, in token of his marriage to the church; and of a *mitre* as an helmet of strength and salvation, that his face being adorned, and his head (as it were) armed with the *horns* of both testaments, may appear terrible to the adversaries of the truth, as also in imitation of the ornaments of Moses and Aaron; and of *gloves*, in token of *clean* hands and heart to be preserved by him. All which, and many other like ceremonies, our church hath laid aside; retaining only such as are most ancient and most grave. *Gibs.* 118.

But at the end of the common prayer book established by parliament in the second year of Edward the sixth, it is ordered, that whensoever the bishop shall celebrate the holy communion, or exercise any other public administration; he shall have upon him, besides his rochet, a surplice or alb, and a cope or vestment, and also his pastoral staff in his hand, or else borne or holden by his chaplain.

And in the rubric before the common prayer in our present liturgy, it is ordered, that such ornaments of the church, and [210] of the ministers thereof at all times of their ministration, shall be retained and be in use, as were in this church of England by the authority of parliament, in the second year of the reign of king Edward the sixth.

And *if any archbishop or bishop, after such election, nomination or presentation, shall be signified unto them by the king's letters patents, shall refuse and do not confirm, invest, and consecrate with all due circumstance as aforesaid, within twenty days next after the king's letters patents of such signification or presentation shall come to their hands: or if any of them, or any other person or persons, admit or do any other thing contrary to the statute of the* 25 *H.* 8. *c.* 20. *in such case every person so offending, their aiders, counsellors, and abettors, shall incur a præmunire.* § 7.

By the eighth *Canon:* Whoever shall affirm or teach; that the form and manner of making and consecrating bishops, priests, and deacons, containeth any thing in it that is repugnant to the word of God; or that they who are made bishops, priests, or deacons in that form are not lawfully made, nor ought to be accounted either by themselves or others to be truly either bishops, priests, or deacons, until they have some other calling to those divine offices; let him be excommunicated *ipso facto*, not to be restored until he repent, and publicly revoke such his wicked errors.

And by the thirty-sixth of the thirty-nine *Articles:* The book

of consecration of archbishops and bishops and ordering of priests and deacons, lately set forth in the time of Edward the sixth, and confirmed at the same time by authority of parliament, doth contain all things necessary to such consecrating and ordering; neither hath it any thing that of itself is superstitious and ungodly. And therefore whosoever are consecrated or ordered according to the rites of that book, since the second year of the forenamed king Edward unto this time, or hereafter shall be consecrated or ordered according to the same rites; we decree all such to be rightly, orderly, and lawfully consecrated and ordered.

And by the act of uniformity in the 13 & 14 *C.* 2. All subscriptions to be made unto the thirty-nine articles, shall be construed to extend (touching the said thirty-sixth article) to the book containing the form and manner of making, ordaining, and consecrating of bishops, priests, and deacons, in this said act mentioned, as the same did heretofore extend unto the book set forth in the time of king Edward the sixth. 13 & 14 *C.* 2. *c.* 4. § 30, 31.

When a bishop is *translated*; the former see is not void by the election to the new one, until the election is *confirmed* by the
[211] archbishop; for though he is elected, yet it may happen that the king shall not consent, or the archbishop may not confirm; and it is not reasonable that the bishop should lose his former preferment, till he hath obtained a new one: And so it is in case of *creation*; he is not completely bishop till *consecration*. 3 *Salk.* 72.

And the dignities or benefices which a bishop was possessed of before his election, become not void till after consecration in the case of creation; and after confirmation, in the case of translation. Upon which foundation it was that all the judges agreed, in the case of *Evans* and *Ascuith*, *M.* 3 *Car.* that if a *commendam retinere* comes, in the former case before consecration, and in the latter case before confirmation, it comes in time enough; because it comes while the bishop is in possession of the dignity or benefice granted *in commendam*. *Palm.* 470. 475. *W. Jones*, 162. *Gibs.* 114.

Installation and restitution of the temporalties. [See *infra*, Div. VI.]

16. Every person being chosen, elected, nominated, presented, invested, and consecrated as aforesaid, and suing their temporalties out of the king's hands, and making oath to the king and to none other as aforesaid, shall and may be throninized or installed as the case shall require; and shall have and take their only restitution out of the king's hands, of all the possessions and profits spiritual and temporal belonging to such archbishoprick or bishoprick, and shall be obeyed in all things according to the name, title, degree, and dignity that they shall be chosen or presented to, and do and execute in every thing touching the same, as any archbishop or bishop of this realm without offending of

the prerogative royal of the crown and the laws and customs of the realm might at any time heretofore do. 25 *H.* 8. *c.* 20. § 6.

Whereupon, the bishop being introduced into the king's presence, shall do his homage for his temporalties or barony; by kneeling down, and putting his hands between the hands of the king, sitting in his chair of state, and by taking a solemn oath to be true and faithful to his majesty, and that he holds his temporalties of him. *God.* 27.

17. Finally; By the 1 *G. st.* 2. *c.* 13. and 9 *G.* 2. *c.* 26. he shall, within six months after his admission, take the oaths of allegiance, supremacy, and abjuration, in one of the courts at Westminster, or at the quarter sessions of the peace. (*t*) Oaths.

[A bishop may confer ordination in any place throughout the world, see **Ordination.** *Palm.* 473.] [Ordination.]

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18. The fees of the whole process, from first to last, are said to amount to about 600*l.* Fees.

19. He shall also compound for and pay his first fruits; as is set forth in the title **First fruits and tenths** [and see **Corody**]. First fruits.

20. Upon promotion of any person to a bishoprick, the king hath a right to present to such benefices or dignities, as the person was possessed of before such promotion; though the advowson belongeth to a common person. And this right of presenting upon promotion by the king, as making the avoidance which would not otherwise happen, did spring from the practice of the popes, and is now an uncontested right of the crown: and hath Benefice or dignity vacant by the bishop's promotion. [See **Benefice**, I. 10.]

(*t*) The 26 *Geo.* 3. *c.* 84. confirmed 59 *Geo.* 3. *c.* 60. § 6. after reciting the necessity by the laws of the realm of the king's licence to elect, and that the bishop shall take the oaths of allegiance, supremacy, and obedience to the archbishop; and that there are divers persons, subjects, or citizens of countries, out of his majesty's dominions, and inhabiting and residing within the said countries, who profess the public worship of Almighty God, according to the principles of the church of England, and who, in order to provide a regular succession of ministers for the service of their church, are desirous of having certain of the subjects or citizens of those countries consecrated bishops, according to the form of consecration in the church of England, ENACTS, that the archbishop of Canterbury or York, with such other bishops as they shall call to their assistance, may consecrate subjects of countries out of his majesty's dominions bishops, without the king's licence for an election, and without requiring them to take the usual oaths; but not without first obtaining his majesty's licence, and ascertaining the fitness of the persons to be consecrated for such consecration. But no person so consecrated shall thereby be enabled to exercise his office within his majesty's dominions. And a certificate shall be given by the archbishop that he was consecrated by virtue of this act. For the ordination of priests and deacons, under similar circumstances, see **Ordination**, VI. 3.

been established not only by long practice, but by many judgments upon full and solemn hearings. *Gibs.* 768.

But in Ireland, the law is, that a man shall not be promoted to a bishoprick there, until he hath resigned all his preferments in England; by which resignation it seemeth that the king's presentation in such case is defeated. (7)

In the case of the *Grocers'* company against *Backhouse* and the archbishop of *Canterbury*, *T.* 11. *G.* 3. it was determined, that where the advowson is in common, so that the patrons are to present by turns, the king's presentation doth not pass for the turn of the otherwise rightful patron, but he shall have his turn in course as it shall fall out. *Blackst. Rep.* 770. (*u*)

[213] III. *Concerning residence at their cathedrals.*

[See Residence, 6.]

1. *Langton.* Bishops shall be at their cathedrals, on some of the greater feasts, and at least in some part of lent, as they shall find expedient for their souls' health. *Lind.* 130.

2. *Langton.* Bishops shall have honest eleemosynaries; shall keep hospitality, and hear the causes of the poor. *Lind.* 67.

3. *Otho.* Bishops shall abide at their cathedral churches, and officiate on the chief festivals, and on the Lord's days, and in lent, and in advent: and shall visit their dioceses at fit seasons; correcting and reforming the churches, and consecrating, and sowing the word of life in the Lord's soil. *Athon.* 55.

4. *Othobon.* Bishops shall be personally resident, to take care of the flock committed to their charge, and for the comfort of the churches espoused to them; especially on solemn days, in lent, and advent: unless their absence is required by their superiors, or for other just cause. (That is by their superiors, either ecclesiastical or secular.) *Athon.* 118.

IV. *Concerning their attendance in parliament.*

Bishops lords of parliament.

1. By the above recited statute of the 25 *H.* 8. *c.* 20. a bishop upon his election shall be reputed and taken as *lord elected*. And by divers other statutes, bishops are called *peers of the land*; one of the *three estates* of the realm; one of the *greatest* estates of the realm; and the like. 25 *Ed.* 3. *st.* 3. *c.* 6. 1 *El.* *c.* 3. 8 *El.* *c.* 1. 4 *Inst.* 1.

How far an act made without the bishops, is good.

2. As to their right in general to sit and vote in parliament; this hath been carried so far by some, that they have asserted,

(7) The king cannot present to a donative, the incumbent of which is made a bishop. *Cu. Parl.* 181.

(*u*) See Benefice, 10.

that an act made in parliament, where the bishops have not been present, is not good. But this lord *Coke* seemeth to have set in a proper and clear light.

There are divers acts of parliament, says he, which appear to have been made by the king, lords temporal, and commons, without the lords spiritual; and it hath been objected, that such are no acts of parliament; and for authority, the roll of parliament in the 21 *R.* 2. is cited, where it is said, that divers judgments were heretofore undone, for that the clergy were not present. To this some have answered, that a parliament may be holden by the king, the nobles, and commons, and never call the prelates to it. But we hold the contrary to both these, and shall make it manifest by records of parliament, first, that the bishops ought to be called to parliament; and then secondly, we shall shew, where acts of parliament are good without them. [214]

To the first, Every bishop hath a barony, in respect whereof according to the law and custom of parliament, he ought to be summoned to the parliament, as well as any of the nobles of the realm.

To the second, If they voluntarily absent themselves, then may the king, the nobles, and commons make an act of parliament without them; as where any offender is to be attainted of high treason or felony, and the bishops absent themselves, and the act proceeds, the act is good and perfect.

Likewise, if they be present, and refuse to give any voices, and the act proceeds, the act of parliament is good without them.

Also, where the voices in parliament ought to be absolute, either in the affirmative or negative, and they give their voices with limitation or conditions, and the act proceeds, the act is good; for their conditional voices are no voices.

Of every of these we will produce examples out of the records and rolls of parliament.

At a parliament holden in the 15 *Ed.* 2. the prelates, counts, barons, and commons of the realm do charge Hugh Spencer the father, earl of Winchester, and Hugh Spencer the son, earl of Glocester, with many high and heinous offences, as by the act called *exilium* Hugonis Lee Spencer *patris et filii* doth appear; and the earls and barons, peers of the realm, in the presence of the king pronounce judgment against them, as by the said act appeareth: and after, at a parliament holden at York, the said judgment and attainder against them (by the king's exorbitant favour towards them, whose favourites they were) was annulled, and one of the causes was, for that the said judgment was given without the prelates: whereas the same being an act of parliament, was entered into the parliament rolls as other acts of parliament were; and the consent of the prelates doth manifestly appear, for that they were parties to the charge. And after, it

was adjudged by the authority of parliament, by the 1 *Ed.* 3. c. 1. that the said judgment against them was good, and they confirmed the same.

At the parliament holden in the third year of king Richard the second, a bill was exhibited against the clergy with many [215] bitter words, for the ill disposing of the dignities, offices, parsonages, canonries, prebends, and other benefices, whereof they were patrons, and which were in their gift, whereof many inconveniences followed; the bishops and other prelates taking great offence at this bill, absented themselves: whereupon the king, upon the complaint of his commons, by the advice and consent of all the lords temporal, passed the bill.

In the same parliament great complaint was made of the extortions committed by the bishops and their officers; and thereupon a bill was framed, that justices of the peace might enquire thereof, and a form of a commission desired to be enacted. The prelates and clergy made their protestation expressly against the said bill, as tending to the blemishing of the liberty of the church. Whereunto it was replied for the king, that neither for their said protestation, nor other words in their behalf, the king would not stay to grant to his justices in that case and all other cases, as was used to be done in times past, and as he was bound to do by virtue of his oath made at his coronation. Whereupon the act and form of a commission passed as was desired.

At a parliament holden in the eleventh year of Richard the second, in the beginning of that parliament holden in that year, the archbishop of Canterbury made openly in the parliament a solemn protestation for himself and the whole clergy of his province, which he desired might be entered; and so it was: the effect whereof was, that albeit they might lawfully be present in all parliaments, yet for that in this parliament matters of treason were to be treated of, whereat by the canonical law they ought not to be present, they therefore absented themselves, saving their liberties therein otherwise. The like protestation did the bishops of Duresme and Carlisle make. At which parliament divers statutes were made, nothing concerning *life or member*; as the seventh chapter concerning merchants, the eighth chapter touching annuities, and the ninth chapter against new impositions, the eleventh concerning keeping of assizes, and the like, all which were good and perfect statutes, and yet the prelates assented not to them.

At the parliament holden in the thirteenth year of Richard the second; when the two bills were read, the one intituled *a confirmation of the statute of provisors, and the forfeiture of him that accepteth a benefice against that statute*, the other intituled *the penalty of him that bringeth in a summons or sentence of ex-* [216] *communication of the pope against any person upon the statute of*

provisors, and of a prelate executing it, both which bills tended to restrain the pope's authority, which he claimed in disposing of ecclesiastical promotions within this realm: the archbishop of Canterbury and York, for the whole clergy of their provinces, made their solemn protestations in open parliament, that they in nowise meant or would assent to any statute or law in restraint of the pope's authority, but utterly withstood the same; the which their protestations at their requests were inrolled: and yet both bills passed, by the king, lords, and commons.

By a statute in the sixth year of Henry the sixth, it was enacted by the king, lords temporal, and commons; that no man shall contract or marry himself to any queen of England (being the widow of a king, 2 *Inst.* 18.) without the special licence and assent of the king, on pain to lose all his goods and lands. The bishop and clergy being present assented to this bill, as far forth as the same swerved not from the law of God and of the church, and so as the same imported no deadly sin. This was holden no assent; and therefore it was enacted by the king, lords temporal, and commons; and so specially entered, omitting the prelates.

And then, speaking of the statute of the 35 *Ed.* 1. *De asportatis religiosorum*, which is a statute specially entered to have been made by the king, the lords temporal, and commons (omitting the prelates); it must be intended, he says, that the bishops absented themselves; or if they were present, protested against it, or gave such voices as were against the law and custom of parliament: And this same act of the 35 *Ed.* 1. in letters patent made within eight years after, is affirmed to be an act of parliament; and by several subsequent acts of parliament is holden for an act of parliament. 2 *Inst.* 585, 586, 587. (8)

Whether they sit in parliament in their temporal capacity only.

3. Concerning the point, whether they sit in parliament in their temporal capacity only, by reason of their temporal baronies; or in their spiritual capacity also, as bishops; the substance of what hath been said seemeth to be as followeth.

Lord *Coke* saith; The lords spiritual, viz. archbishops and bishops, being 24 in number, sit in parliament by succession, in respect of their counties, or baronies parcel of their bishopricks. And every one of these, when any parliament is to be holden, ought *ex debito justitiæ* to have a writ of summons. And they may make their proxy as other lords of parliament. 1 *Inst.* 97. [217]
4 *Inst.* 1. 12.

(8) On the other hand, *Blackstone* presumes a bill would be equally binding, if a bill passed the *house* when the lords temporal present were inferior to the bishops in number, and every one of the former gave his vote to reject it; though *Coke* (4 *Inst.* 35.) seems to doubt whether this would not be an ordinance, rather than an *act* of parliament. 1 *Bla. Comm.* 156.

And again; Every archbishoprick and bishoprick in England are of the king's foundation, and holden of the king *per baroniam;* and in this right the archbishops and bishops are lords of parliament; and this is a right of great honour that the church now hath. 2 *Inst.* 3.

And this, saith Dr. *Gibson*, is true; but not the whole truth. For, although their baronies did put them more under the power of the king, and under a stricter obligation to attend; yet long before William the conqueror changed bishopricks into baronies, they were, as bishops, members of the *mycel-synod* or *witenagemot*, which was the great council of the land. And an argument of their spiritual capacity in parliament, is, that from the reign of Edward the first to Edward the fourth inclusive, as appears by the records, great numbers of writs to attend the parliament were sent to the *guardians of the spiritualties*, during the vacancies of bishopricks, or while the bishops were in foreign parts. The writs of summons also preserve the distinction of *prelati* and *magnates;* and whereas temporal lords are required to appear *in fide et ligeantia*, in the writs to the bishops the word *ligeantia* is left out, and the command to appear is *in fide et dilectione. Gibs.* 127. *Seld. Tit. of Hon.* 575.

And in 3 *Salk.* 73. it is said, that bishops did sit and had a vote in parliament, in the time of the Saxons: but it was not in respect of any barony, but by a personal privilege, as they were bishops: for they were not barons until the Norman reign; for in the reign of the Saxons, they were free from all services and payments, excepting only to castles, bridges, [and, as it should have been added, expeditions:] but William the conqueror deprived them of this exemption, and instead thereof turned their possessions into baronies, and made them subject to the tenures and duty of knights' service.

Unto all which may be added, what lord *Hale* delivers, in a manuscript treatise touching the right of the crown, as set forth by the very learned Dr. *Warburton* bishop of Gloucester, in his "Alliance between church and state," p. 131. as follows:—— The bishops sit in the house of peers, by usage and custom; which I therefore call usage, because they had it not by express charter; for then we should find some. Neither had they it by tenure; for, regularly, their tenure was in free-alms, and not *per*
[218] *baroniam:* and therefore it is clear, they were not barons in respect of their possessions, but their possessions were called baronies, because they were the possessions of customary barons. Besides, it is evident that the writ of summons usually went *electo et confirmato*, before any restitution of the temporalties; so that their possessions were not the cause of their summons. Neither are they barons by prescription; for it is evident, that as well the lately erected bishops, as Gloucester, Oxon, &c. had

voice in parliament, and yet erected within time of memory, and without any special words in the erection thereof to entitle them to it. So that it is a privilege by usage annexed to the episcopal dignity within the realm; not to their order, which they acquire by consecration; nor to their persons, for in respect to their persons, they are not barons, nor to be tried as barons, but to their incorporation and dignity episcopal.

A bishop may sit in parliament upon his confirmation.

4. A bishop *confirmed* may sit in parliament, as a lord thereof. It is laid down by lord *Coke*, that a bishop *elect* may so sit; but in the case of *Evans* and *Ascuith* before mentioned, *Jones* held clearly, that a bishop cannot be summoned to parliament before *confirmation*, without which the election is not complete. And he adds that it was well known, that *Bancroft*, being translated to the bishoprick of *London*, could not come to parliament before his confirmation. However, if a bishop may come presently after confirmation, and before homage and restitution of temporalties; he comes as soon as he is invested with the spiritualties, and is not of necessity to wait for his temporalties, which is a further argument of a spiritual as well as temporal capacity in parliament. *Gibs.* 129.

Bishops translated, pay no new fees in parliament.

5. Bishops being *translated*, pay no new fees upon their being introduced into parliament. This, with the like order for peers raised to higher dignities, was made a standing rule, when a table of fees was settled in the year 1663. *Gibs.* 128.

Bishops' places of residence, during their attendance in parliament.

6. Anciently, the greatest part of the bishopricks in England, had seats (or, as they were commonly called, *places*) in or near London, in which they were resident during their attendance on parliament, on the court, or their own proper occasions; and during those attendances, they might freely exercise jurisdiction in their respective *places*, as in their own proper dioceses; and this is referred to in the statute of the 33 *H.* 8. *c.* 31. for dissevering the bishoprick of Chester from the archbishoprick of Canterbury, in which there is this clause, "saving to the bishop "of Chester and his successors, that his house at Weston, being [219]
"within the diocese of Coventry and Litchfield, shall be ac-"counted and taken to be of his diocese, and that he being "resident in the same, shall be taken and accounted as resident "in his own diocese, and for the time of his abode there shall "have jurisdiction in the same, likewise *as all other bishops have* "*in the houses belonging to their sees in any other bishoprick within* "*this realm for the time of their abode in the same.*"

But now most of those houses are either exchanged, or (being built into private houses) are held in lease of the bishopricks to which they belonged; and no houses, now remaining, come under the circumstance here mentioned (of being a place of residence, in another diocese) but Lambeth house and Croydon, belonging to the archbishop of Canterbury; Winchester place,

now removed from Southwark to Chelsea, and Ely house in Holborn. *Gibs.* 132. (9)

Order of their sitting in parliament.

7. The bishops shall sit in parliament, on the right side of the parliament chamber, in this order: First, the archbishop of Canterbury; next to him, on the same form, the archbishop of York; then the bishop of London; then the bishop of Durham; then the bishop of Winchester; then all the other bishops after their ancienties. 31 *H.* 8. *c.* 10. § 3. (1)

Whether they may vote in cases of blood.

8. By a canon of the council of Toledo, no bishop, or abbot, or any of the clergy, was to be a judge in case of life or limb. *Gibs.* 125.

This canon is said to have been introduced into England by archbishop Lanfrank; and confirmed in a synod held at London, and made a standing rule of the English church. *Id.*

And this the clergy claimed as an exemption and privilege; and esteemed their attendance in parliament, generally as a badge of ecclesiastical slavery. *Id.*

And in the case before us, as they did apprehend themselves under an indispensable obligation to the canon, the king gave them leave to withdraw: nevertheless, by the 11th constitution of Clarendon, they were required to be present until judgment was to be given. *Id.*

Afterwards by a constitution of Archbishop Langton, it was enjoined, that no clergyman should exercise secular jurisdiction, especially in cases of blood. *Lind.* 269.

And by a constitution of Othobon: — "In causes of blood, "in which judgment of death, or mutilation of members is "given, we injoin that none of the clergy presume to be a judge [220] "or assessor; on pain that besides the suspension from his "office which he shall *ipso facto* incur, he shall be otherwise "punished according to the discretion of his superior; from "which sentence of suspension he shall in no wise be absolved, "unless he first make a competent satisfaction." *Othob.* Athon. 92.

And in consequence of the aforesaid canons, the archbishops and bishops were wont to withdraw when causes of blood were to be heard: with a protestation nevertheless, that such absence

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(9) Thus the residences of bishops in London seem anciently to have been extra-diocesan; but this privilege merges on transfer of the mansion to other uses. Thus Ely chapel, formerly part of Ely 'Episcopal House,' was held not extra-diocesan. *Burton* v. *Wells*, 1 *Haggard's Rep.* 21. *Qu.* if modern residences of bishops in London can be considered extra-diocesan? *Ibid.* As to the present Ely House, see 12 *Geo.* 3. *c.* 43.

(1) If any of them is a privy counsellor, he takes place next after the bishop of Durham. 1 *Inst.* 94.

should not be any infringement of their right to sit and vote in such cases, if the canons were out of the question. *Gibs.* 125.

And in fact, there are several instances wherein bishops did sit and vote, or wherein their right was acknowledged to sit and vote in like cases.

As in the 4 *Ed.* 3. Roger de Mortimer, Berisford, Mautrevers, and others, were adjudged traytors, by bishops and others in parliament.

In the 15 *Ed.* 3. Archbishop Stratford was acquitted of treason in parliament, by four earls, four bishops, and four barons.

In the 5 *Hen.* 4. the commons thank the lords spiritual and temporal, for their good and rightful judgment in freeing the earl of Northumberland.

In the 3 *Hen.* 5. the commons pray judgment of the lords spiritual and temporal on the earl of Cambridge.

In the 5 *Hen.* 5. Sir John Oldcastle was attainted of treason and heresy by the lords spiritual and temporal.

Nevertheless, lord *Coke* says generally, in cases of trial for treason, misprision of treason, or felony, the lords spiritual must withdraw, and make their proxies. 3 *Inst.* 31.

But Dr. *Gibson* observes, that when the bishops entered their protestation and withdrew, neither the temporal nor spiritual lords understood them to be under any engagement to withdraw from any law of the land. And much less can it be pretended, he says, that they are under any legal obligation in our reformed church; since the canon itself (speaking of the canon of the council of Toledo) at first founded in superstition, and now probably abolished by law, as being to the damage or hurt of the king's prerogative royal, was disregarded for a long time after the reformation. It is true, in the tumultuous times of king Charles the first, this advantage, among many others, was taken and insisted on, against the ecclesiastical state. But when it came to be a question in the reign of king Charles the second, the most [221] eminent civilians of that time were advised with by the bishops in convocation, and unanimously gave an opinion under their hands, that by their staying in the house of lords, while cases of high treason were in agitation there, they were in no danger of irregularity; which was the ancient penalty annexed to the canon. *Gibs.* 125.

And Mr. *Hawkins*, speaking of this matter, saith thus: It is agreed, that at a trial before the house of peers, every temporal lord who hath a right to vote in that house, hath a right to pass on such trial. But it is said in the year book of 10 *Ed.* 4. 6. that upon the trial of a peer in parliament, the bishops shall make a procurator, because they cannot consent to the death of a man; but this is said to be wholly grounded on a canon not in force at this day; neither do I find (says he) any precedent

wherein they have been excluded against their consent, or have withdrawn themselves without a protestation of their right or making a proxy; and the judgment against the Spencers was expressly reversed for this reason among others, because the bishops were not present; and in the precedents chiefly insisted on of the other side, it is not expressly said that they were not present, and it doth not clearly appear but that they might be included under the word peers. However it hath been always admitted, that they have a right to vote in a bill of attainder; also in the Earl of Danby's case, they were adjudged by the house of lords to have a right to vote in questions previous to the trial of a peer, though this was strongly opposed by the house of commons. And their right to vote at the trial itself, if they think fit, seems fully implied in the statute of the 7 *W.* c. 3. which enacteth, *That* upon the trial of any peer or peeress for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned twenty days at least before every such trial, to appear at every such trial, and that every peer so summoned and appearing shall vote in the trial, every such peer first taking the oaths of allegiance and supremacy, and subscribing and repeating the declaration against popery. 2 *Haw.* 423.

But upon this, Sir *Michael Foster* (after having stated the difference between a trial before the court of the high steward, and a trial in full parliament, or before the king in parliament) observes as follows: before this act the real mischief seems to have been, that in the trial of a peer in the court of the high
[222] steward, the peer's triers were a select number, returned at the nomination of the high steward; and the prisoner was in every case debarred the benefit of a challenge. This was the real mischief, and it was in many cases severely felt. Accordingly, the act applieth the proper remedy; for it enacteth, "that upon "the trial of a peer, all the peers having right to sit and vote in "parliament shall be summoned twenty days before the trial, to "appear and *vote at such* trial; and every peer so summoned "and appearing shall vote *in the trial of such* peer, having first "taken the oaths appointed by the act." ——— The next clause provideth, "that neither this act, nor any thing therein con- "tained, shall any ways extend, or be construed to extend, to "any impeachment or *other proceeding in parliament in any* "*kind whatsoever.*" ——— The words of the last clause are very general, and seem to exclude every proceeding *in full parliament* for the trial of a peer in the ordinary course of justice. But that construction was rejected in the cases of the earls of Kilmarnock and Cromartie, and of the lord Balmerino, after the late rebellion. And accordingly all the peers and lords spiritual were summoned. And those lords who appeared having taken the

oaths appointed by the act, the bishops upon the day the trial came on, after making the usual protestation, withdrew. And the prisoners before their arraignment were informed by the high steward, that they were entitled to the benefit of this act in its full extent. The summoning the lords spiritual to the trial of those lords was (Sir *Michael* says) he apprehends a prudent caution, in order to obviate a doubt that might otherwise at that critical time have arisen from the words of the statute, which (as was before observed) are very general. But general as they are, he says, he doth not conceive that they made that measure, though extremely prudent, *absolutely and indispensably necessary*. For general words in a statute must be controuled by the apparent intent of the legislature. They must in construction be adapted to cases then in contemplation, and to every other provision in the statute, so as to render the whole one uniform consistent rule. —— And now to apply this observation to the present case. The act provideth, that every peer so summoned and appearing shall vote *in the trial*. By voting *in* the trial, must (he says, as he apprehends) be meant voting *throughout* the trial, voting as a competent judge, in every question that shall arise during the trial; and above all, in the grand question for condemnation or acquittal. Now, upon this last question the bishops cannot vote. [223] Though it hath been resolved, and practice hath established the rule, that in a proceeding in full parliament in a case of blood, they may, if they choose it, vote upon all previous questions. But in a proceeding in the court of the high steward, which he conceives this clause of the statute had principally in contemplation, and to which no mere spiritual lord was ever summoned or could be, no question but for acquittal or condemnation is the subject of any vote. For in all points of law or practice the high steward gives the rule, as sole judge in the court. —— To conclude this head, the act may (he says) with propriety enough, be said to regulate the proceeding in both courts, that of the high steward, and that in full parliament; but it doth not alter the nature and coustitution of either. Consequently, it doth not give to the lords spiritual any right in cases of blood, which they had not before. *Fost. Crown Law*, 247.

Whether they shall be tried by the lords in parliament, or by a jury.

9. Dr. *Gibson* saith, The lords spiritual enjoy the same legal privileges (trial by peers excepted, if they have not that also) that the temporal barons do enjoy; as to have a day of grace; hunting in the king's forests, and the like. *Gibs.* 133. *Tr. per pais*, 10.

Sir *Wm. Staunforde* saith thus: Duchesses, countesses, and baronesses shall be tried as peers of the realm; but so shall not bishops; for none of the statutes relating thereunto have been put in ure to extend to bishops, albeit they enjoy the

name of lords of parliament; for they have not this name by reason of nobility, but by reason of their office, and have not a place in parliament in respect of their nobility, but in respect of their possession, *viz.* the ancient baronies annexed to their dignities. *Stamf.* 153.

Lord *Coke* saith; Every lord of parliament, and that hath voice in parliament, and is called thereunto by the king's writ, shall not be tried by his peers, but only such as sit there by reason of their nobility (2), as dukes, marquises, counts, viscounts, or barons; and not such as are lords of parliament by reason of their baronies which they hold in the right of the church, as archbishops and bishops, and in time past some abbots and priors; but they shall be tried by the country, that is, by freeholders, for that they are not of the degree of nobility. 1 *Inst.* 31. 3 *Inst.* 30.

Lord *Hale*, in the manuscript before quoted, says, that the bishops, in respect of their persons, are not barons, nor to be tried as barons.

[224] And the late Mr. *Madox*, in a manuscript now in the British Museum, concerning the *Antiquity of passing bills in parliament*, speaking of this matter of bishops, says, that out of parliament, their honour not being inheritable, they are to be tried by ordinary freeholders.

On the other hand, Mr. *Hawkins* observes as follows: It is said by *Staumforde* and *Coke*, that those who are lords of parliament, not in respect of their nobility, but of their baronies which they hold of the crown, as bishops now do, and some abbots and priors did formerly, are not within the intent of *magna charta*, to be tried by the peers. And *Selden* seems clear, that this is the only privilege which bishops have not in common with other peers. And those who seem most for the contrary opinion, admit that the law hath been generally so taken. Neither do they produce any precedent, where a bishop or abbot hath been tried by the peers upon a *commission* (3); but on the contrary, admit that there are two precedents of their being tried by the country or a jury. And it is said by others, that there are divers precedents of this kind; yet Selden, with his utmost diligence, seems able to produce but two which clearly and fully come up to this point, *viz.* those of archbishop Cranmer and bishop Fisher. However, it seems to be agreed, that while the parliament is sitting, a bishop shall be tried by the peers. 2 *Haw.* 424.

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(2) This is contravened by Mr. *Christian*, in his notes to 1 *Bla. Com.* 401. 4 *ed.* 264, 265.; and by Dr. *Wooddeson*, in 2d vol. of *Vinerian Lectures*, 585; and see *Bishop of St. David's* case, *infra*, 235.

(3) In the court of the lord high steward, *Bro. Abr.* tit. *Trial*, 142.

Finally, lord chief baron *Gilbert*, in his treatise on the Court of Exchequer, page 40. says thus: "The bishops generally claimed an ecclesiastical privilege, to be tried only by the archbishop as their ordinary; therefore in the case of *Mark*, bishop of Carlisle, where this challenge was made of the liberties of the church, and over-ruled, he did not challenge his peerage. And so was the case of *Fisher*, bishop of Rochester, in Henry the eighth's time. For they would not make any challenge to be tried by their peers; for that would have admitted a temporal jurisdiction. So by non-user of any right of being tried by their peers in capital cases, these bishops who held *per baronium*, and had consequently a privilege to have such a trial, totally lost the same, and are tried by a common jury.

10. Prelates are included by name in the statutes which give the actions *de scandalis magnatum*. 2 *R*. 2. *c*. 5. 12 *R*. 2. *c*. 11. **Bishops included in the acts *de scandalis magnatum*.**

11. None but the king's courts of record, as the court of common pleas, the king's bench, justices of gaol delivery and the like, can write to the bishop to certify bastardy,* loyalty of matrimony, and the like ecclesiastical matter; for it is a rule in law, that none but the king can write to the bishop to certify, and therefore no inferior court, as London, Norwich, York, or any other incorporation; but in those cases, the plea must be removed into the court of common pleas, and the court must write to the bishop, and then remand the record. And this was done in respect of the honour and reverence which the law gave to the bishop, being an ecclesiastical judge, and a lord of parliament. 1 *Inst*. 134. **What courts may write to the bishop to certify bastardy, and the like.** *[225]

V. *Spiritualties of bishoprics in the time of vacation.*

1. When a bishop dies, or is translated, or is employed beyond the seas in negotiations for the service of the king and kingdom; the law takes care to provide a guardian as to the spiritual jurisdiction, during such vacancy of the see or remote absence of the bishop, to whom presentations may be made, and by whom institutions, admissions, and the like, may be given: And this is that ecclesiastical officer, whether he be the archbishop, or his vicar-general, or deans and chapters, in whomsoever the office resides, whom we commonly call the guardian of the spiritualties. *God. Introd.* 9. *God.* 39. (4) **What is meant by guardian of the spiritualties.**

2. By the canon law, the dean and chapter are guardians of the spiritualties during the vacancy. And it hath been allowed, that of common right they are so at this day in England, and that the archbishop hath this privilege only by prescription or composition. 2 *Inst*. 15. *Wood*. *b*. 1. *c*. 3. *Johns*. 56. **Who shall be guardian of the spiritualties.**

(4) See *Com. Dig.* tit. *Prerogative*, (D 26, 27.)

And divers deans and chapters do challenge this by ancient charters from the kings of this realm. *God.* 39.

But now generally here in England, during the vacancy of any see within his province, the archbishop is guardian of the spiritualties (as hath been said) by prescription or composition; whereby all episcopal rights of the diocese belong unto him, and all ecclesiastical jurisdiction is exercised by him or his commissioners, for that time, *God.* 39. 42. *Ayl. Parerg.* 125.

But when an archiepiscopal see is vacant, the dean and chapter of his diocese are guardians of the spiritualties (5); that is, the spiritual jurisdiction of this province and diocese is committed to them. *God.* 41.

And by the 25 *H.* 8. *c.* 21. when the see of the archbishopric
[226] of Canterbury is void, the guardian of the spiritualties shall grant faculties, licences, and dispensations (throughout both provinces) as the archbishop might have done. § 16.

His power.

3. The guardian of the spiritualties hath all manner of jurisdiction of the courts, as the power of granting licences to marry, probate of wills, and administration of intestates' estates, during such vacancy; and also of granting admissions and institutions: but he cannot as such consecrate, or ordain, or present to vacant benefices, or confirm a lease. *God.* 21. 39. *Wood. b.* 1. *c.* 3.

And perquisites.

4. And he shall have the perquisites that happen by the execution of such power, until the new-elected bishop may by law execute the same. *Wats. c.* 40.

When his power ceaseth.

5. After election and confirmation (and not before) the bishop is fully invested with a right to exercise all spiritual jurisdiction; and consequently, then the power of the guardian of the spiritualties ceaseth. *Gibs.* 114.

VI. *Temporalties of bishoprics in the time of vacation.*

What is meant by temporalties.

1. A bishop's temporalties are all such things as the bishops have by livery from the king, as castles, manors, lands, tenements, tithes, and such other certainties, of which the king is answered during the vacation. *Wats. c.* 40. (6)

Who hath the custody

2. The custody of the temporalties of every archbishopric

(5) This obtains in Canterbury since the office of prior of Canterbury was abolished at the Reformation. 2 *Roll. Abr.* 22.

(6) See *Com. Dig.* tit. *Prerogative,* (D 23, 24, 25.) On the death of a bishop, the king, by his prerogative, shall have his palfrey, bason and ewer, and kennel of hounds: and process shall issue for them, if not compounded. *Saville,* 53. *Mandamus* to a visitor to exercise his visitatorial power over the temporalties of a cathedral church, concerning the intermediate profits during vacancy of a stall, was denied; the question arising out of a matter triable at common law. *The King* v. *Bp. of Durham,* 1 *Bur.* 567.

and bishopric within the realm, and of such abbies and priories as were of the king's foundation, after the same became void, belonged to the king during the vacation thereof, by his prerogative; for as the spiritualties belonged during that time to the dean and chapter of common right, or to some other ecclesiastical person by prescription or composition; so the temporalties came to the king, being patron and protector of the church, in so high a prerogative incident to his crown, as no subject can claim the temporalties of an archbishopric or bishopric when they fall, by grant or prescription. 2 *Inst.* 15. [See **Benefice**, I. 9. (7)

of the temporalties.

3. And upon the filling of a void bishopric, not the new bishop, but the king by his prerogative, hath the temporalties thereof, from the time that the same became void, to the time that the new bishop shall receive them from the king. *Wats.* *c.* 40.

Who hath the profits thereof during the vacation.

And by the statute of the 17 *Ed.* 2. *st.* 1. *c.* 14. The king shall have escheats of lands of the freeholders of archbishops and bishops, when such tenants be attainted for felony in time of vacation, whilst their temporalties were in the king's hands to give at his pleasure, saving to such prelates the service that thereto is due and accustomed. [227]

Accordingly, the temporalties being in queen Elizabeth's hands, a copyhold escheated: which was granted by the queen, and it was held to be good. *E.* 12. *El. Covert's* case, *Cro. El.* 754.

4. By the 1 *Ed. st.* 2. *c.* 2. Because before this time, in the

Undue seizing of the

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(7) *Blackstone* (*Com.* 282, 283.) assigns the additional reason, that the policy of the law has vested this custody in the king: because, as the successor is not known, the lands and possessions of the see would be liable to spoil and devastation, if no one had a property therein. Therefore the law has given the king, not the temporalties themselves, but the *custody* of them till a successor is appointed, with power of taking to himself all the intermediate profits, without any account of the successor, and with the right of presenting (which the crown very frequently exercises) to such benefices and other preferments as fall within the time of vacation. 17 *Ed.* 2. *c.* 14. *F. N. B.* 32. This revenue is of so high a nature, that it could not be granted out to a subject before, or even after it accrued, till now by 14 *Ed.* 3. *st.* 4. *cc.* 4, 5. the king may, after the vacancy, leave the temporalties to the dean and chapter, saving to himself all advowsons, escheats, and the like: at present, by customary indulgence, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalties, quite entire and untouched, from the king, and at the same time does homage; at which time, and not before, he has a fee-simple in his bishopric, and may maintain an action for the profits. *Co. Litt.* 67. 241.

temporalties, the bishop being living.

time of king Edward, father to the king that now is, the king by evil counsellors caused to be seized into his hands the temporalties of divers bishops, with all their goods and chattels therein found, *without any cause* (8), and the same held in his hands by a long season, and continually thereof took the profits, to the great damage of the same bishops, wastes and destructions of all their chattels, manors, parks, and woods; the king will and granteth, that from henceforth it shall not be done.

By the 14 *Ed.* 3. *st.* 1. *c.* 3. We will and grant, that from henceforth we nor our heirs shall not take, nor cause to be taken into our hands, the temporalties of archbishops, bishops, abbots, priors, or other people of holy church, of what estate and condition they be, without a true and just cause, according to the law of the land, and judgment thereupon given.

By the 25 *Ed.* 3. *st.* 3. *c.* 6. Because the temporalties of archbishops and bishops have been oftentimes taken into the king's hands, for contempts done to him upon writs of *quare non admisit,* and likewise for divers other causes, whereof the prelates have prayed the king that no such taking shall from henceforth be made; the king willeth and granteth, that the justices who shall give judgment against any prelate in such case or the like, shall receive for the contempt so judged a reasonable fine at the time of the judgment if the party offer the same, or otherwise after the judgment, at what time the party will offer himself.

Committing waste during the vacation.

5. Ranulph, chaplain to king William Rufus, and afterwards by him made bishop of Durham, was a factor for the king in making merchandize of church livings, inasmuch as when any archbishopric, bishopric, or monastery became void; first, he persuaded the king to keep them void a long time, and converted the profits thereof sometime by letting, and sometime by sale of the same, whereby the temporalties were exceedingly wasted and destroyed: secondly, after a long time no man was
[228] preferred to them by delivery of the ring and staff, by livery of seisin, freely, as the old fashion was, but by bargain and sale from the king, to him that would give most; by means whereof, the church was stuffed with unworthy and insufficient men, 2 *Inst.* 15.

But by the great charter, 9 *H.* 3., it is enacted as follows: The guardian, so long as he shall have the custody of the land of an heir within age, shall keep up the houses, parks, warrens, ponds, mills, and other things pertaining to the same land, with the issues of the said land; and he shall deliver to the heir

(8) But *semble,* For an enormous offence in a bishop, his temporalties may be seized *in manus regis.* 2 *Roll.* 228. *l.* 20. *Com. Dig.* tit. *Prerogative,* (D 25.)

when he cometh to his full age, all his lands stored with ploughs and all other things, at the least as he received it. All these things shall be observed in the custodies of archbishoprics, bishoprics, abbeys, priories, churches, and dignities vacant which appertain unto us; except this, that such custody *shall not be sold*. *c*. 5.

Shall not be sold] *Fleta* saith, that the same shall not be sold nor let to farm; yet the king may commit the temporalties of them during the vacation, as by the statute of the 14 *Ed*. 3. (hereafter following) doth appear. 2 *Inst*. 15.

By the statute of the 3 *Ed*. 1. *c*. 21. In right of lands of heirs being within age, which be in ward of their lords, it is provided, that the guardian shall keep and sustain the land, without making destruction of any thing; and that of such manner of wards shall be done in all points as is contained in the great charter, and that it be so used from henceforth. And in the same manner shall archbishoprics, bishoprics, abbacies, churches, and all spiritual dignities be kept in time of vacation.

By the 14 *Ed*. 3. *st*. 4. Because that in the petition of the prelates and clergy it is contained, that escheators and other keepers, in the time of vacation of archbishoprics, bishoprics, and other prelacies, have done great waste and destruction; we will and grant, that at all times from henceforth, when such voidances shall happen, that our escheators and the escheators of our heirs which for the time shall be, shall enter and cause to be well kept the said voidances, without doing waste or destruction in the manors, warrens, parks, ponds, or woods: and that they sell no underwood, nor hunt in the parks or warrens; nor fish in ponds nor free fishings, nor shall rack nor take fines of the tenants, free nor bond; but shall keep and save as much as appertaineth to the said voidances, without doing harm or any manner of oppression. And if the dean and chapter of churches, cathedral priors, subpriors, prioresses, subprioresses, and covents of prelacies, abbies or priories, whose voidance pertaineth to us and our heirs, will render to us and our heirs the value of the said voidance, as other will reasonably yield, then the chancellor and treasurer shall have power to let to them [229] the said voidances by good and sufficient surety, so that they shall have the same before all other, yielding to us the value of them, according as shall be found by remembrances of the exchequer, or by inquest to be taken upon the same if need be, without making fine. And in case they will not accord to yield to the value, nor find such surety; then the chancellor and treasurer shall cause to be ordained the good preservation of such voidances by escheators or other sufficient keepers to answer the king of that to him pertaineth reasonably, without doing

waste or destruction, or other thing which may turn in disherison of the churches whereof such voidances shall happen. c. 4.

And we do grant full power to our said chancellor and treasurer, which taking to them other of our council such as to them shall seem best to be taken, by good information of remembrances of the exchequer and other informations as to them shall seem best, shall let the vacations of archbishoprics, bishoprics, abbacies, priories, and other houses whose voidances pertain unto us, to the dean and chapter, prior or subprior, prioress or subprioress, and covent, to yield a certain of every voidance by the year, quarter, or month during the vacations, according as to them shall seem best, without making any fine; so that no escheator nor other minister, in the time of vacation, shall have cause to enter or meddle to do any thing, which shall be in prejudice of the churches, whereof such voidances shall happen: saving to us and to our heirs, the knight's fees, advowsons of churches, escheats, wards, marriages, reliefs, and services of the said fees. c. 5.

Remedy for the successor, for waste done in the time of his predecessor.

6. By the 52 *H.* 3. *c.* 28. *It is provided,* That if any wrongs or trespasses be done to *abbots, priors, or other prelates* of the church, and they have sued their right for such wrongs, and be prevented with death before judgment given therein; their successors shall have their actions to demand the goods of their church out of the hands of such trespassers. Moreover, the successors shall have like action for such things as were *lately withdrawn* by such violence from their house and church before the death of their predecessors, though their said predecessors did not pursue their right during their lives. And if any intrude into the lands or tenements of such religious persons in the time of the vacation, of which lands their predecessors died seised as in the right of their church, the successors shall have a writ to recover their seisin. And damages shall be awarded them, as in assise of *novel disseisin* is wont to be.

It is provided] There were two mischiefs at the common law (as many did hold); the first, that if goods were taken away in
230] the life of the predecessor, after his death the successor had no remedy for such trespasses; and the other mischief was, that if in time of vacation any intrusion were made, the successor had no remedy to recover the land with damages, though thereof his predecessor died seised: and both these are remedied by this act. 2 *Inst.* 151.

Abbots, priors, or other prelates] The word *prelates* being placed after abbots and priors, who are inferior to archbishops and bishops, lord *Coke* supposeth, that these last are not comprehended in this act, and labours to prove that they are not. But *Fitzherbert* is of a contrary opinion, and includes arch-

bishops in the word *prelates*, and also in the words [*of such religious persons*] in the latter clause; and says, that the bishop shall punish a trespass done in time of vacation of the bishopric, in cutting down of trees and the like, for of right the king cannot cut such trees; but for hunting in the parks, or fishing in the piscaries, it seemeth the *king* ought to have the action for the trespass done in the time of the vacancy: But if they do destroy all the fish within the fish-pools, or kill all the deer in the parks, in the time of the vacancy; it seemeth reasonable, that by this statute the successor have an action for such trespass. *Gibs.* 655.

Lately withdrawn] Yet if the taking of the goods were long before such death, the successor shall have an action of trespass by this statute. 2 *Inst.* 152.

7. When a new bishop is made, he may not *de jure* before his consecration claim the temporalties of his bishopric, although that *ex gratia* the king by his letters patents may [and usually does] grant them unto him after his confirmation, and before his consecration, and the grant then made is good: but after that he is consecrated, invested and installed, he may sue for his temporalties out of the king's hands by a writ directed to the escheator. Yet upon such writ, the temporalties are not *de jure* to be delivered, until the metropolitan hath certified the time of his consecration, although that the freehold of the temporalties be in him by the consecration. *Wats.* c. 40, [*Co. Lit.* 67. 341. *ante* 226. note (6).]

When the custody of the temporalties ceaseth.

VII. *Archbishops' jurisdiction over their provincial bishops.*

1. The archbishop hath two concurrent jurisdictions, one as ordinary or bishop within his own diocese, the other as superintendant throughout his whole province of all ecclesiastical matters, to correct and supply the defects of other bishops. (9) [231]

General power of the archbishop.

(9) *Bp. of St. David's* case, 3 *Salk.* 90. *Wrighton* v. *Browne*, 3 *Leviaz.* 212. And therefore his ecclesiastical acts within his province are only voidable, and not void, though done when the jurisdiction belonged to a bishop or other ecclesiastical person within his province; and he grants administration when they are not *bona notabilia* (5 *Co.* 30. *a.* *Com. Dig.* tit. *Administrator*, (B 3.),) or institutes to an advowson within a peculiar in his province. *Wrighton* v. *Browne*, 3 *Lev. R.* 212. So he hath provincial power over all bishops in his province; may hold a court when he pleases therein, and officiate in person as judge (*Bp. of St. David's* v. *Lucy*, 1 *Salk.* 134. 1 *Raym.* 447. 539.), or by vicar-general; and may deprive them (*Lucy* v. *Bp. Watson*, *infra*), or convene them before him for dismeanor in their function. (S. C. *Carth.* 485.)

Present-ment of the excesses of bishops.

2. By a canon of *Edmund* archbishop of Canterbury, There shall be *in every deanry, two or three men*, having God before their eyes, who at the command of the archbishop or *his official*, shall present unto them the *public excesses of prelates, and other the clergy*. Lind. 277.

Two or three men] Which office devolved afterwards upon the churchwardens. *Id.*

In every deanry] That is, rural deanry. *Id.*

His official] Who hath the same consistory with the archbishop himself, at least in those things which concern his metropolitical jurisdiction. *Id.*

Public excesses] That is, notorious: whereof great and public infamy doth arise. *Id.*

Of the prelates] To wit, bishops; who inasmuch as they are his suffragans, are subject immediately to the archbishop and his official; and also the officials of the same bishops. *Id.*

And other the clergy] viz. Subject to the said suffragans. *Id.*

Archbishop's visitation of bishops.

3. If the archbishop visit his inferior bishop, and inhibit him during the visitation; if the bishop hath a title to collate to a benefice within his diocese by reason of lapse, yet the bishop cannot institute his clerk; but the clerk ought to be presented to the archbishop, and the archbishop is to institute him, by reason that during the inhibition, the bishop's power of jurisdiction is suspended. *God.* 19.

Whether he can proceed to deprivation.

4. There seemeth to be some confusion in the books, concerning the deposing or depriving of a bishop. The truth is, *deposing* is one thing, and *depriving* is another thing very different. *Deposition* implies the taking away, or putting him from the office itself, or degrading him from the order of bishop; *deprivation* only takes from him the exercise thereof in such a particular diocese, leaving him still bishop as much as he was before, and only vacates his promotion.

As to the former of these, the power of *deposing*, Dr. *Ayliffe* says, that by a canon of the council of Lateran, bishops cannot be deposed by their metropolitans, without the pope's leave or licence so to do; even as a bishop cannot by his power alone depose any clerk from his orders, though he may by himself give a person orders. *Ayl. Parerg.* 124. (*v*)

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And Dr. *Godolphin* says, that the consecration of a bishop is *character indelebilis*: insomuch that although it should so happen, that for some just cause he should be deprived or removed from the see, or suspended *ab officio et beneficio*, both from his spiritual jurisdiction as to the exercise and execution thereof, and also from the temporalties and profits of the bishopric; yet he still retains the title of a bishop, for that it is supposed the

(*v*) *C.* 3. *Q.* 6. *c.* 8. *Dist.* 67. *c.* 2.

order itself cannot absolutely be taken from him. *God. Rep. Can.* 49.

But as to *deprivation*, Dr. *Ayliffe* says, that in England, an archbishop may deprive a bishop, if his crime deserves so severe a punishment; and that it is said in the canon law, that a bishop who is unprofitable to his diocese ought to be deprived, and no coadjutor assigned him, nor shall he be restored again thereunto. *Ayl. Par.* 124.

And Dr. *Gibson* delivers it absolutely, that the archbishop has a right to deprive a suffragan bishop; and for the same refers to the case of *Lucy* and Dr. *Watson* bishop of St. *David's*, *E.* 11 *W.* (1), which was thus: Lucy promoted a suit *ex officio* before archbishop Tenison, in a court held at Lambeth before the archbishop himself in person (who called to his assistance six other bishops) for simony and other offences. And the bishop of St. David's moved the court of king's bench for a prohibition; and the suggestion was,

First, That it doth not appear, that the bishop of St. David's was cited to appear in any court whereof the law takes notice; for the citation is, that he should appear before the archbishop of Canterbury or his vicar-general, in the hall of Lambeth house: which is not any court whereof the law takes notice: for the archbishop hath the same power over his suffragan bishops, as every bishop hath over the clergy of his diocese; but no bishop can cite the clergy before himself, but in his court: and therefore the citation ought to have been here, to appear in the arches, or some other court of the archbishop. But it was answered, that without doubt the archbishop hath jurisdiction over all the clergy, as well bishops as others, within his province: And for that was cited the case of Dr. *Wood* bishop of Litchfield and Coventry, who in the year 1687 was suspended by archbishop Sancroft for dilapidations, and the profits of the bishopric were sequestered, and the episcopal palace was rebuilt out of them, and he died under that sequestration: And there was cited also the case of *Marmaduke Middleton*, bishop of St. David's, who in the year 1582 was suspended [233]
by the high commissioners (who had not any new, or greater jurisdiction than the archbishop) for misapplication and abuse of the charity of Brecknock (which was one of the crimes of which this present bishop is also accused). And *Holt* chief justice said: The admitting of that point of the jurisdiction to be disputed, would be to admit the disputing of fundamentals, which the counsel of the other side attempt to subvert, not duly considering the respect due to the primate and metropolitan of England; for the archbishop of Canterbury has without doubt

(1) *Carthew*, 485. 1 *Lord Raym.* 541. 1 *Salk.* 135.

provincial jurisdiction over all his suffragan bishops, which he may exercise in what place of the province it shall please him; and it is not material to be in the arches, no more than in any other place; for the arches is only a peculiar, consisting of divers parishes in London, exempt from the bishop of London, where the archbishop of Canterbury exerciseth his metropolitical jurisdiction, but he is not confined to exercise it there: And the citation is here to appear before the archbishop himself, or his vicar-general, who is an officer of whom the law takes notice; for the vicar-general in the provinces is of the same nature as the chancellor in every particular diocese; and the dean of the arches is the vicar-general of the archbishop in all the province.

Secondly, It was urged by the counsel of the bishop for the prohibition, that the matters contained in the articles exhibited against the bishop before the archbishop were of temporal cognizance, and not cognizable before the archbishop: The first of which articles was, that the bishop of St. David's, being incumbent of the church of Boroughgreen in the county of Cambridge, covenanted with William Brooks for two hundred guineas, to make him his curate, and to resign to him his rectory, when he should be requested to do it. But by *Holt* chief justice, Simony is an offence by the canon law, of which the common law doth not take notice to punish it; for there is not a word of *simony* in the statute of Elizabeth, but of buying and selling: Then it would be very unjust, if ecclesiastical persons might offend against the ecclesiastical duty in such instances, of which the common law cannot take notice to punish them, and yet the King's bench should prohibit the spiritual court from inflicting punishment according to their law: The clergy are subject to a law different from that to which laymen are subject; for they are subject to obey the canons; for the convocation of the
[234] clergy may make laws to bind all the clerks, but not the lay people; and if the clergy do not conform themselves, it will be cause of deprivation.

Then the counsel for the bishop said, that another article against the bishop was, that he took excessive fees, for conferring orders, institutions, visitations, and the like; which amounts to extortion; and therefore is punishable by indictment at the common law; and the rather, because they shew custom for the said fees, and the spiritual court cannot try custom or not. But it was answered and agreed to by the court, that these offences in the spiritual court, and by the canon law, are simony. And by *Holt* chief justice, By the canon law, and of common right, no parson ought to take any thing for christening of children, burials, or the like, but by custom they are allowed to take something; and procurations are suable only in the spiritual court, and are

merely an ecclesiastical duty; and it is a question, whether the taking more for them than ought to be taken, can be extortion at common law; and in the present case, the matter of custom is not in question, for then they ought to have laid a positive custom to take such a sum, which is not here, but only that he took more than the usual fees; but if the custom had been laid, it seemed to him that a prohibition would not have lain; because it concerns mere ecclesiastical persons and rights, and therefore may be founded upon their ecclesiastical constitutions.

Then the counsel for the bishop said, that another article against him was, that he ordained a man, and did not administer to him the oaths according to the 1 *W.* and yet certified under his episcopal seal that he had taken the oaths, whereas he had not taken them; which is punishable by the statute of the 1 *W.*, at common law, being a breach of the statute. But to this it was answered by the court, that the statute hath made it now part of the office of a bishop, to tender the oaths upon ordination; and then the metropolitan may proceed against a bishop, if he doth not obey the statute in this point, for proceeding contrary to his office of bishop.

Then the counsel for the bishop argued, that another article against him was, that he had ordained a man under age; that the bishop made his defence and said, that the churchwardens had certified to him that he was of full age; to which the promoter answered, that the certificate was forged, for the said churchwardens did not certify, and one of them could not write; so that this article imports forgery, and therefore examinable and [235] punishable at the common law; and since the act of uniformity hath altered the law, they ought to proceed on the said act, for ordaining under age. But the court said, that the distinction which would answer almost all these objections, was this; that as to what relates to the office of bishop, and is against his duty as a bishop, the spiritual court may proceed against him, to deprive him, but not punish him as for a temporal offence: in *Caudrey*'s case, 5 *Co.*, upon a special verdict found it appeared that Caudrey was deprived for preaching against the common prayer; and though there was other punishment appointed by the statute, and not deprivation until the second offence, yet it was held, that the spiritual court might proceed by their own law, and deprive him for the first; it being against the duty of his office as a minister, and they having power to purge their body of all scandalous members.

Another article was, for the abuse of the charity at Brecknock, and for putting out the schoolmaster there, and for detaining a deed of exemplification. And a prohibition was granted as to this article, but denied as to the rest. *L. Raym.* 447.

A prohibition being denied, the archbishop went on, and

many scandalous things were proved against the bishop of St. David's, to the satisfaction of the court. But when they were going to give judgment, the bishop, though he had waved the privilege of his peerage, and had gone on submitting to the authority of his judge, yet then resumed his privilege. No regard however was had to this plea, since it was not offered in the first instance: and the archbishop pronounced a sentence of deprivation. 2 *Warn.* 656.

Upon this, the bishop of St. David's appealed to the delegates: and perceiving that they were of opinion to affirm the sentence, he moved again for another prohibition to be granted to the commissioners' delegate, to stay their proceedings in the appeal from the sentence of the archbishop; upon a suggestion, 1. That by the canon law, the archbishop alone could not deprive a bishop. 2. That the delegates refused to admit his allegations.

As to the first, *Holt* chief justice and the rest held, that an archbishop hath power over his suffragan bishops, and may deprive them: that though there may be co-ordination amongst the bishops *jure divino*, yet there is a subordination *jure ecclesiastico qua humano*; not of necessity from the nature of their
[236] offices, but for convenience: and for what other purpose have archbishops been instituted by ecclesiastical constitutions? The power of an archbishop was very great here in England anciently; and he had the same jurisdiction of supremacy, as the patriarchs of Constantinople and other places. The pope used to call him *alterius orbis papam*, and he exercised the same jurisdiction with him. Theodore, who was archbishop not long after Austin, deprived Winifred bishop of York, for the said see was not then metropolitical, but subject to the archbishop of Canterbury; and yet at the same time there was a council held, and Beda commends Theodore for it. But afterwards, in the time of Henry the first and king Stephen, the pope usurped the authority of the archbishops; in exchange for which they became *legati nati* of the pope. And that is the reason why this practice cannot be found to have been put in use for so long a time. But at this day, by the act of *Hen.* 8. this jurisdiction is restored. It was always admitted that the archbishop had metropolitical jurisdiction, and the bishops swear canonical obedience to him; and where there is a visitatorial power, there is no reason to question the power of deprivation; for the same superiority, which gives him power to pass ecclesiastical censures upon the bishops, will give him power to deprive, it being only a different degree of punishment for a different degree of offence. And to question the authority of the archbishop, is to question the very foundations of the government. But *Holt* chief justice said, that though he was fully satisfied that the archbishop hath such jurisdiction; yet he would not make that the ground of

denying a prohibition in this case: the matter of the suggestion is, that the archbishop is restrained by the canon law, from proceeding without the assistance of others: whether he be so or not, is matter proper for the conusance of the delegates upon the appeal, but is no ground to prohibit them from proceeding; and it is without precedent, to grant a prohibition to the ecclesiastical court, because they proceed there contrary to the canons.

Then it was moved, that the court would grant a mandamus to the delegates, to admit the bishop's allegations; and it was compared to the cases where they grant mandamuses to compel the granting of probates of wills, or letters of administration. But by *Holt* chief justice, The king's bench cannot grant a mandamus to them, to compel them to proceed according to their law: indeed mandamuses are grantable to compel probate of wills, because it concerns temporal right; and to compel the granting of letters of administration, because the statute directs to whom they shall be granted. But in the present case a mandamus was not granted. [237]

Upon the whole, a prohibition was denied by the court: and they ordered that the suggestion be entered on record, that the court might enter their reasons of denial. *L. Raym.* 539.

After which denial of the prohibition, the bishop of St. David's petitioned to the lord chancellor Somers to have a writ of error upon this denial of the prohibition; who having some doubt whether it would lie or not, referred it to the then attorney-general, who certified his opinion to be, that a writ of error would lie in this case. Upon which, the suggestion was entered upon record, and the denial of the prohibition; and the writ of error was granted, and the whole record brought by the chief justice into parliament. And afterwards, upon hearing of his opinion, the lords of parliament were of opinion, that a writ of error would not lie in this case.

And lord *Raymond* says, that lord chief justice *Holt* told him, if the lords had been of opinion, that the prohibition ought to have been granted, yet he never would have granted it. *L. Raym.* 545.

And Dr. Watson was afterwards excommunicated for nonpayment of costs; and in Michaelmas term in the 1 *An.* was brought into the court of king's bench upon an *habeas corpus* directed to the sheriff of Middlesex, in order to be discharged. To which writ the sheriff made a long return, in which the *significavit* and *excommunicato capiendo* were shewn at large; by which it appeared, that the defendant was in custody of the sheriff, being arrested upon an *excommunicato capiendo*, being excommunicate for non-payment of costs, in which he was condemned by the commissioners' delegate. And the return of the *habeas corpus* being filed (though the defendant was informed

that the *significavit* was bad, and that by exception taken to it he might be discharged) his counsel offered a plea ingrossed, and signed by counsel, that he long before, and at the time of the prosecution was, and now is bishop of St. David's: that he was summoned to parliament in the seventh year of king William, and sat there as bishop, as appeared by the record; and so concluded in abatement because a *capias* doth not lie against a peer. And the intent of this plea was, to have the judgment of the
[238] king's bench upon it, and upon the same judgment to bring a writ of error in parliament, where he hoped to have judgment in his favour as to the right of the bishopric, of which he was deprived by the archbishop. And therefore his counsel insisted, that their plea should be received, and that they were ready to try it with the attorney-general, whether the defendant was bishop or not; and that if he is bishop, as they say he is, then a *capias* will not lie against him, because he is a peer of parliament. But the court refused at first to receive the plea. 1. Because the defendant is not in custody of the marshal; and therefore he cannot plead so as he has here. 2. He hath not made any conclusion to his plea, and therefore the court doth not know what judgment he desires. 3. All the court held, that bishops are subject to be excommunicated, and if an *excommunicato capiendo* should not lie against them, there would be a judgment without a power of executing it, which is absurd.

But afterwards the defendant amended his plea, and pleaded as in custody of the sheriff of Middlesex. And upon the importunity of the defendant's counsel, the plea was received, and a day given to the queen's attorney-general to reply to it, or demur, as he should judge proper. But the attorney-general, not being ready for the queen, prayed another day. And afterwards he came, and declared to the court that he would not intermeddle in the matter. Upon which the court said, that since it appeared to them that the *significavit* was ill, because it did not appear that these costs were adjudged in a cause of ecclesiastical cognizance, they quashed the writ of *excommunicato capiendo*, and discharged the defendant, and refused to take any notice of the plea. *L. Raym.* 817.

But Dr. Watson having been promoted by king James the second, that party, though ashamed of Watson as a corrupt and vicious prelate, yet continued to support him. The archbishop's jurisdiction was therefore excepted against in the house of lords, under a pretence that he could not judge a bishop, but in a synod of the bishops of the province, according to the rules of the primitive times. In answer to which it was shewn, that from the ninth century downward, both popes and kings had concurred to bring this power singly into the hands of the metropolitans; that it was the constant practice in England before the Reformation; and by the provisional clause in the act of the 25 *H.* 8. impower-

ing a new body of ecclesiastical laws to be drawn, all former laws and customs were to continue in force till that new code was [23 framed; which confirmed the power the metropolitan was then possessed of. Nor could the archbishop erect a new court, or proceed in the trial of a bishop in any other way than in that which was warranted by law or precedent. To this no answer was made (nor could be made); but yet the business was kept up by the bishop's friends, and at last dropped, with an intimation that it was hoped the see would not be filled, till the house was better satisfied of the archbishop's authority. 2 *Warn.* 656. (2)

But it may not be improper to take notice here, that according to the sense of the canon law, it is not regular to subject suffragans to the censure of the *officers* of an archbishop (from that reverence which is due to the episcopal office): And accordingly, in the time of archbishop Cranmer, Nix, bishop of Norwich, protested against the proceedings of the archbishop's commissary in his metropolitical visitation; because it was against the dignity of a bishop to be judged or proceeded against by a commissary. *Gibs.* 1006.

[The archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. 1 *Bla. Com.* 380, 381. *Gibs.* 768.]

5. Every bishop (Dr. *Gibson* says), whether created or trans- Optio lated, is bound, immediately after confirmation, to make a legal conveyance to the archbishop of the next avoidance of one such dignity or benefice belonging to his see, as the said archbishop shall chuse and name; which is therefore commonly called an *option.* Of this we find early mention in the records of the see of Canterbury, among the presentations, institutions, and collations of the archbishops; but with these two variations, that in some places it is said to be due *ratione consecrationis;* and that anciently the person to be promoted was named to the bishop, and not the dignity or benefice he was to be promoted to. But ever since archbishop Cranmer's time at least, the way hath been to convey the advowson, either of the first dignity or benefice that should fall, or of some one certain, to the archbishop, his executors

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(2) This tribunal, by which the infamous bishop of Clogher was deprived in 1822, consisted of the archbishop and other bishops of the province.

(3) This prerogative seems to be derived from the legantine power formerly annexed by the popes to the metropolitan of Canterbury, *Sherlock on Options*, I., and was probably set up by the popes in imitation of the imperial prerogative of *primæ* or *primariæ preces*, whereby the emperor exercises, and has immemorially exercised, a right of naming to the first prebend that becomes vacant after his accession, in every church of the empire; a right which was also exercised by the crown of England in the reign of Edw. I.

and assigns, at first for twenty-one years, and afterwards for the next avoidance. But in case the bishop dies, or is translated, before the present incumbent of the promotion chosen by the archbishop shall die or be removed, it is generally supposed that the option is void; inasmuch as the grantor, singly and by himself, could not convey any right or title beyond the term of his continuance in that see. *Gibs.* 115. (*x*)

[240] And if the archbishop dies before the avoidance shall happen, the right of filling up the vacancy shall go to his executors or administrators. As in the case of *Richardson* against *Chapman* and others, Nov. 21. 1759, which was thus: Dr. John Potter, late archbishop of Canterbury, being possessed of or entitled to the next presentation to, or disposition of, several benefices or dignities in the church, called by the name of options, under grants from the bishops of the province, by virtue of the prerogative of the see of Canterbury, did by his will, dated Aug. 12. 1745, bequeath the same in the words following: "I give and bequeath to my executors, all my options, in trust nevertheless, that in disposing of the said options, regard be had, according to their discretion, to my eldest son, Mr. Potter, archdeacon of Oxford; to my sons in law the husbands of my daughters; to my present and former chaplains, and other domestics, particularly to Dr. Tunstall my chaplain, and to Mr. Hall my librarian; also to my worthy friends and acquaintance, particularly to the reverend Dr. Richardson of Cambridge, who will, I hope, in due time, find some opportunity to rectify those mistakes in his printed accounts of my dear and most honoured patron archbishop Tenison, of which he has been by me advertised." And the archbishop appointed Dr. Paul, Dr. Andrew, and Dr. Chapman, his executors.

Dr. Andrew died in the life-time of the testator. The testator died in October, 1747. And Dr. Paul and Dr. Chapman, the surviving executors, proved the will.

The benefices and establishments in the church, which are called options, are of such nature, that if an option, happening to be vacant, be not filled up during the continuance of the bishop in the same see, upon whose promotion such option arose to the archbishop, such option is gone or lost; as it would be also, if such option should not become vacant before the said bishop should die or be translated: and in those instances, the archbishop who made the option, if he be living, or his executors, will not be entitled to present to such options. (*x*)

The said archbishop, before or after making his will, had

(*x*) But the presentation falls to the crown, per Ld. *Hardwicke*, Ch. *Amb.* 98. *Dr. Potter* v. *Dr. Chapman and Dr. Paul*, S. C. 2 *Ves.* jun. 531.

amply provided for his said son, Dr. John Potter, and his sons in law, and Dr. Tunstall; and had also promoted Dr. Chapman to the value of about 600l. a-year.

The first option that fell, was the treasurership of the cathedral church of Chichester. And thereunto Dr. Paul presented his [241] co-trustee Dr. Chapman. Whereupon the said Dr. Potter, and the sons in law of the said archbishop, filed their bill in chancery; insisting, that Dr. Potter, as being first named in the will, and after him the sons in law, were entitled before any others to be presented to the options as they became vacant. Dr. Paul by his answer said, that Dr. Chapman having been one of the archbishop's chaplains, he the said Dr. Paul taking into consideration, that in case of his death, the sole right of presenting to the options on a vacancy would vest solely in Dr. Chapman, and that Dr. Chapman might by means thereof be incapable of any legal presentation in form to any option, as he could not present himself, and for want thereof might be hindered from having any of the options for his own benefit, but that the complainants in the said suit, or any of the other objects named in the testator's will, might at any time afterwards be presented to all the other options on a vacancy, —— did therefore present Dr. Chapman to the dignity of the treasurership of Chichester; and further said, that he was willing to join in presenting the several other persons named or pointed out by the archbishop in his will to the options, as the same should become vacant; and did not intend, in case Dr. Chapman should be established in the treasurership, to present him to any other of the options. Dr. Chapman likewise by his answer said, that he was willing and desirous; and believed Dr. Paul was willing and desirous, from time to time, as the other remaining options should become vacant, to present thereto the several persons named or pointed out by the archbishop in his will, according to the best of their discretion, and according to the trusts reposed in them. — And Dr. Chapman was established in the said treasurership. (*y*)

The second option that fell, was a rectory with cure of souls; of which no further notice is taken in the report.

After this, Dr. Paul died.

The third option (which is the option in question) that became vacant, was the precentorship of Lincoln. Whereupon Dr. Chapman, who was now the only surviving executor, waited on the bishop of Lincoln, desiring to be admitted into the office or dignity of precentor as patron of that turn, upon his own prayer, with an offer of exchange for it of preferment in his own possession, for the accommodation of some other of the expectants. The bishop took time to consider of it; and afterwards [242]

(*y*) *Amb.* 98.

wrote to Dr. Chapman, and informed him, that if he the said Dr. Chapman had been absolute patron of that turn, he would have admitted him to the precentorship upon his prayer; but that as it appeared he was not such patron, but only in trust, he desired to see an extract of the archbishop's will, and a copy of the order of the court of chancery relating to the treasurership of Chichester, whereupon he might determine whether he could properly admit Dr. Chapman to the precentorship or not.

In the mean time, Dr. Chapman took occasion to speak with Mr. Venner, nephew to the wife of archbishop Potter, of whose education the archbishop had taken particular care, and for whom he had expressed a great regard, and had promoted him in Kent to a living of 100l. a-year, and expressed his intention to promote him further. Dr. Potter also, the archbishop's eldest son, had, some time after his father's death, applied to the trustees of his options, for some favour in them to Mr. Venner. And now, upon this vacancy, Dr. Chapman told Mr. Venner that he had long intended to serve him, and that an option, the precentorship and canonry residentiary of Lincoln, was at that time vacant, by which he might be benefited or served; and asked him, whether as the canonry itself would not perhaps suit him, he could not like or be satisfied with Dr. Chapman's living of Mersham, which he knew was commodious to his other living. To this Mr. Venner immediately assented. And the bishop having, as aforesaid, signified to Dr. Chapman, that it was necessary for him to make a presentation, Dr. Chapman did execute a presentation of the said Mr. Venner to the precentorship. And thereupon Mr. Venner signed a certificate to the bishop, that Dr. Chapman had offered to him the said precentorship, but that he chose in lieu thereof, and in the way of exchange, certain other preferment more suitable to him, then in the possession of the said Dr. Chapman; humbly requesting, that the bishop, instead of himself, would be pleased to admit Dr. Chapman to the precentorship.

In the mean time, Dr. Richardson filed his bill against the several parties, to wit, Dr. Chapman, Mr. Venner, Dr. Tunstall, Mr. Hall, Dr. Potter, Dr. Tanner, Dr. Milles, Dr. Sayer, and the bishop of Lincoln; charging the several matters before stated, and that the first and principal view of Dr. Chapman was, to obtain the precentorship to himself, without resigning any pre-
[243] ferment: and when he found a difficulty in so doing, he then first resolved to make use of Venner, by way of exchange of other preferment of less value; that all the persons particularly named in the archbishop's will, had either from the archbishop in his lifetime, or since his death by means of his options, received some benefit or preferment, except him the said Dr. Richardson, who had, since the archbishop's death, altered his

printed account of the life of archbishop Tenison, agreeably to the intimation given him by the archbishop in his will: and all the defendants, except the bishop of Lincoln, were required to set forth, whether they claimed to be presented to the said precentorship of Lincoln: and it was prayed, that the said bishop of Lincoln might be restrained by injunction from doing any act for the induction, installation, or establishment either of Venner or Chapman, or any other person to the precentorship, till the matter should be determined.

To which bill the several defendants put in their answers. And Chapman and Venner by their answers insisted that Venner was presented for his own benefit and advantage, and without any agreement or promise whatsoever for an exchange. But Chapman by his answer admitted, that he had for twelve months then last past and upwards, had within himself an intention of making an exchange with Venner for the said option, in case Venner, after his being admitted, should be willing to make such exchange; and believed that the said Venner had been, and should in such case be willing, to make such exchange with him the said Chapman; but that he was not absolutely determined within himself, and therefore could not set forth, in case the said Venner should be admitted to the vacant option, and should offer to exchange with him for any preferment of his, whether he the said Chapman should or should not comply with such offer; and therefore did not know, nor could form any belief, whether such their intention was at an end. — And the said defendant Venner by his answer said, that in case he had been inducted into and in the possession of the said vacant option, upon the presentation made by Chapman, without any obstruction or impediment attending the same; he the said defendant Venner, after such induction, should have been willing, and did within himself intend, to exchange the same with the defendant Chapman, for his living of Mersham, or some other preferment in the possession of him the said Chapman, in case Chapman would have consented thereto: and said, that he was, at the time of [244] putting in his answer, inclined to believe, that he shall and doth intend, after his being inducted into and in possession of the option, to exchange the same with the defendant Chapman for his living of Mersham, in case the defendant Chapman would consent thereto. — And the defendants Dr. Potter, Dr. Sayer, Dr. Tanner, and Dr. Milles, by their answers renounced and resigned all right or claim of being nominated or presented to the said precentorship. And Dr. Tanner, and Dr. Milles said, they were the more willingly induced to relinquish all right or claim thereto, in order to open the way to the plaintiff, whom they knew to be a person very much respected by the late archbishop Potter in his lifetime. — The defendants Tunstall and

Hall, by their answers, insisted on a prior right to the plaintiff, under the trust of the archbishop's options, being named next after his son and sons in law. But not appearing to the appeal afterwards, they relinquished thereby their claim. — The bishop by his answer said, that he was willing to be restrained as aforesaid, until the right should be determined.

After a full hearing of the cause before the lord keeper, the 17th, 19th, 20th, and 21st days of November 1759: his lordship, after stating the case, delivered his opinion to the following effect: "The arguing of this cause hath taken up much time, but the merits of it lie in a small compass. The whole question is reducible to this single consideration, whether the archbishop has or has not given his options, with any imperative words, whereby a right is derived to any of the persons named in his will. This is a particular kind of trust, in which great latitude is left to the judgment of the trustees. It is difficult to say, whether any of the persons named were entitled or not to any of these options *jure remediali*. Yet I have no doubt to say, this court would not have suffered Dr. Chapman to have abused his trust, by taking any thing to himself. Nay, I will go farther, and say, that if here was sufficient proof, that the defendant Chapman had made a bargain with Mr. Venner for presenting him to his option, I would set aside such presentation with indignation. I own there is strong foundation of suspicion and jealousy, that such was the original of Venner's merit with Chapman: But then it is expressly denied both by Dr. Chapman and Mr. Venner, in their answers to the bill, that there was any agreement between them at the time of Chapman's presentation of Mr. Venner; but that it was merely a transaction to serve Mr. Venner. And I must give credit to these answers upon
[245] oath, whatever may be my suspicions to the contrary. For it would be dangerous, if this court was to make its decrees on jealousies and suspicions, and not on facts. It is plain, the defendant Chapman meant to take this option at first to himself; but when that was checked by the bishop of Lincoln, then the evidence is, that Chapman presented Venner without any agreement between them for that purpose. This trust, in my opinion, is only a personal confidence, or *jus precarium*, according to lord *Bacon's* distinction and definition: And in the Roman law, the *fidei commissum* was precarious, so late as till Augustus's time. By the rules of this court, a request in a will at this day is imperative: but then there ought to be a particular person named and pointed out, who is to take the benefit. As to these options themselves, the archbishop's right to them is not a right of property, but of prerogative; and in their very nature they partake of a trust, to be disposed of for public utility. In my opinion, the archbishop has communicated his right to his ex-

ecutors, as freely as he would have exercised it himself; directing them at the same time to have a regard to those he himself had a regard to. But supposing the defendant Venner to be excluded from his precentorship, who must this court honour with this preferment? There are a number of persons named in the archbishop's will: It would be impossible for this court to take the personal merits of each of them into consideration, as the archbishop and his executors might do, who were personally acquainted with them. But it has been said, that Venner will resign in favour of Dr. Chapman; and so by that means he will obtain this preferment at last to himself: But this cannot be done without the intervention of the bishop of Lincoln; and in such case Dr. Chapman would take this preferment upon the bishop's presentation; whose worth and honour I know so well, that I am sure he would give no countenance to any transaction that was wrong. Upon the whole then, the archbishop's will is reduced to a dilemma, which neither side contends for: First, If it is to be taken as a rogation or request made by the archbishop, then I see no reason why the persons named in the will might not take as they are named in the will *in ordine* and in succession, which is a thing I would not chuse to say sitting in this court,—that the fruits of this ecclesiastical prerogative, trusted to the archbishop himself for purposes of public utility, should be doled out by this court to the husbands of his daughters, and smelling rankly of marriage brokage. Then, Secondly, I must say, this [246] was a full delegation of the archbishop's authority to his executors, and consequently discretionary. In my opinion, Mr. Venner is the properest object of this option. Dr. Tunstall, as hath been proved, hath a provision of 500*l.* a year; Mr. Hall has two livings; Dr. Richardson is master of Emanuel college; and Mr. Venner, who was a nephew of Mrs. Potter's, and adopted by the archbishop, has a family and 100*l.* a year." ——— And the bill was dismissed.

But on appeal to the house of lords by Dr. Richardson, Mar. 22. 1760. After a full hearing of three days, the lords ordered so much of the decree as was complained of by the appellant to be reversed; and that Dr. Chapman should present Dr. Richardson to the precentorship, and pay the said Dr. Richardson's costs in the said cause in the court of chancery.

Seal.

6. The archbishop of the province is entitled to the seals of a bishop deceased. And this is no more than a just and reasonable provision against their being used to ill purposes by executors, or others; to prevent which, they are to be broken. *Gibs.* 133.

VIII. *Of suffragan bishops.*

What is meant by a

1. In former times many bishops had their suffragans, who were also consecrated as other bishops were. These, in the

suffragan bishop.

absence of the bishops upon embassies, or in multiplicity of business, did supply their places in matters of orders, but not of jurisdiction. They were anciently called *chorepiscopi*, or bishops of the *country*, by way of distinction from the proper bishops of the *city* or see. They were also called subsidiary bishops, or bishops *suffragan* (from *suffragari*, to help or assist); and were titular bishops, consecrated by the archbishop of the province, to execute such power and authority, and to receive such profits, as were limited in their commissions by the bishops or diocesans whose suffragans they were. *God.* 30. *Gib.* 134. *Wood*, *b.* 1. *c.* 3.

Also, in a less proper sense, all the provincial bishops, with respect to the archbishop, are sometimes called his suffragans.

Sees of suffragan bishops.

[247]

2. By the 26 *H.* 8. *c.* 14. § 1. *Forasmuch as no provision hitherto hath been made for* suffragans, which have been accustomed to be had within this realm, for the more speedy administration of the sacraments and other good, wholesome, and devout things and laudable ceremonies, to the increase of God's honour, and for the commodity of good and devout people, it is enacted that *the towns of Thetford, Ipswich, Colchester, Dover, Guildford, Southampton, Taunton, Shaftsbury, Molton, Marlborough, Bedford, Leicester, Glocester, Shrewsbury, Bristow, Penrith, Bridgwater, Nottingham, Grantham, Hull, Huntingdon, Cambridge*, and the towns of *Pereth*, and *Berwick*, *St. Germains* in *Cornwall*, and the isle of *Wight*, shall be taken and accepted for sees of bishops' suffragans.

Forasmuch as no provision hitherto hath been made] That is, by act of parliament; as had been for archbishops and bishops by the 25 *H.* 8. *c.* 20.

The towns of Thetford, &c.]. The suffragans have their sees in towns; and not in cities, as the bishops in England have.

Nomination of a suffragan bishop.

3. And every archbishop, and bishop, being disposed to have any suffragan, shall name two honest and discreet spiritual persons, being learned and of good conversation, and present them to the king, by writing under their seals, making humble request to his majesty, to give to one such of the said two persons as shall please his majesty, such title, name, style, and dignity of bishop *of such of the sees above specified, as he shall think most convenient.* And the king, upon such presentation, shall have power to give him the style, title, and name of a bishop of such of the sees aforesaid, as he shall think convenient; so it be within the province whereof the bishop that doth name him is. And he shall be called bishop suffragan of the same see. 26 *H.* 8. *c.* 14. § 1, 2.

Of such of the sees aforesaid as he shall think convenient]. As there are not sees for suffragans appointed in every diocese, so neither is the king obliged to give the suffragan a title within the diocese of the bishop who doth recommend him; but he may

(without regard to the diocese wherein they are to officiate) give them any of the titles mentioned in this act; nevertheless, generally, the titles have been given within the dioceses they were to assist in. *Gibs.* 134.

4. And after such title, style, and name so given, the king shall present him by his letters patent under the great seal, to the archbishop of the province, requiring him to consecrate the said person, and to give him such other benedictions and ceremonies, as to the degree and office of a bishop suffragan shall be requisite. 26 *H.* 8. *c.* 14. § 3. **Mandate for consecration.**

To the archbishop of the province] By the canon law, the consecration was to be by the bishop, assisted by two neighbouring bishops. *Gibs.* 135. [248]

5. And the bishop that shall nominate the suffragan, or the suffragan himself that shall be nominate, shall provide two bishops or suffragans to consecrate him with the archbishop, and shall bear their reasonable costs. 26 *H.* 8. *c.* 14. § 7. **Consecration of a suffragan bishop.**

And the archbishop having no lawful impediment, shall consecrate such suffragan, within three months next after the letters patent shall come to his hands. § 5.

6. And the person so consecrated, shall have such capacity, power, authority, and reputation, concerning the execution of such commission, as by any of the said archbishops or bishops within their diocese shall be given to the said suffragans, as to suffragans of this realm *heretofore hath been used and accustomed.* 26 *H.* 8. *c.* 14. § 4. **His power.**

Heretofore hath been used and accustomed] There is no doubt, but the persons received to be suffragan bishops in England, before the making of this act, were confined to the exercise of such powers only as they had commission for from time to time; supposing the proper bishop not to be wholly disabled by infirmities of body or mind; and therefore the limiting them to such commissions here was only a continuance of them in their former state. *Gibs.* 135.

And their office usually was to confirm, ordain, dedicate churches, and the like; that is, to execute those things which pertain to the episcopal *office:* as to *jurisdiction* and *temporalties,* these (in case of the infirmities of a bishop in body or mind) were put under the management of a *coadjutor,* constituted by the archbishop. *Gibs.* 134.

And by the said statute of the 26 *H.* 8. *c.* 14. it is provided, that no such suffragan shall take any profits of the places and sees whereof they shall be named, nor have or use any jurisdiction or episcopal authority within the said sees, nor within any diocese or place, but only such profits, jurisdiction, and authority, as shall be licensed and limited to them by any archbishop or bishop within their diocese to whom they shall be suffragans,

by commission under their seals; and every archbishop and bishop for their own particular diocese, may give such commission to such suffragan as hath been accustomed, or as shall by them be thought requisite, reasonable, and convenient: and no suffragan shall use any jurisdiction, ordinary, or episcopal power,
[249] otherwise, nor longer time than shall be limited by such commission, on pain of a præmunire. § 6.

His residence.

7. And the residence of him that shall be suffragan over the diocese where he shall have commission, shall serve him for his residence as sufficiently as if he were resident upon any other his benefice. 26 *H.* 8. *c.* 14. § 7.

May hold two livings.

8. And such suffragan exercising the said office by such commission as aforesaid, for the better maintenance of his dignity, may have two benefices with cure. 26 *H.* 8. *c.* 14. § 8.

Suffragans disused.

9. Suffragans have been now disused for many years; and indeed they are not now so necessary as they were in the times of popery; the bishops then having much more employment, in the matter of benedictions, consecrations, and the like: nevertheless, suffragans may still be of great use, especially sometimes in the article of confirmation, where the dioceses are very large, and the diocesan perhaps very infirm.

In king Charles the second's declaration touching ecclesiastical affairs, immediately before his restoration, one head is as follows: — Because the dioceses, especially some of them, are thought to be of too large extent, we will appoint such number of suffragan bishops in every diocese as shall be sufficient for the due performance of their work. *Gibs.* 134.

IX. *Of coadjutors.*

It was an ancient custom in the church, that when a bishop grew very aged, or otherwise unfit to discharge the episcopal office, a *coadjutor* was taken by him or given to him, at first, in order to succeed him, but in later times only to be an assistant during life, in matters chiefly of jurisdiction, as in collating to benefices, granting institutions, dispensations, and the like: and in this case it was not necessary that such coadjutor should be episcopally ordained. But the duties merely episcopal, as the conferring orders, confirmation, and consecrations of divers kinds, were in such case committed to the suffragan bishop, as hath been said. And this was the practice here in England especially: the two ends, of orders, and of jurisdiction voluntary, in case of the inability of a bishop, were answered by two several persons; the first under the name of suffragan, and the second under the name of coadjutor. *Gibs.* 137.

In the canon law direction is given for a coadjutor also to an *archdeacon*; and in our ecclesiastical records, there are many

instances, modern as well as ancient, of coadjutors given to other dignitaries, and also to incumbents of benefices. *Gibs.* 137. (z)

Blasphemy. See Profaneness.
Bona notabilia. See Wills.
Bond of resignation. See Simony.
Books belonging to the church. See Church.
Books belonging to parochial libraries. See Library.

Boscage.

BOSCAGE (perhaps from Βοσκω, to feed) seemeth to be that food which wood and trees do yield unto cattle, as of the leaves and croppings; and herein differeth from *pannage*, which consisteth of the fruit of such trees, as acorns, crabs, or mast: which, as yielding a tithe, are treated of under the title Tithes.

Boundaries of parishes. See Parish.
Brawling in the church or church-yard. See Church, X. 7.

Briefs. [251]

1. BY the 4 *An. c.* 14. When letters patent, commonly called briefs, shall be issued out of chancery, copies thereof to the number required by the petitioners, and no more, shall be printed by the printer of the queen, her heirs, or successors, at the usual rates for printing.

(z) *Innocent* III. to the archbishop of Arles; "You have stated to me that the bishop of Orange having laboured under a severe and incurable disease for nearly four years, so that he cannot by any means discharge his pastoral duty, the prince of the country, and the inhabitants of the city, have unremittingly requested you, as their metropolitan, to take their case into consideration; but since you cannot, and indeed ought not, to compel him to yield up his charge, and instead of adding to his affliction, ought to pity his misfortunes; for he was a good man, and wholesomely governed the church committed to him: we, willing to provide as well for the bishop as the church, decree, that you shall associate to him as coadjutor, a provident and honest man, who may act with advantage both for the bishop and the people." X. 3. 6. 5. See also tit. Coadjutor.

2. The printer shall deliver the same to such persons only as shall, by the consent of a majority of the petitioners, undertake the laying or disposing of them.

3. The undertaker shall give to the printer a receipt for the same, expressing therein the number of copies; which printer shall forthwith deliver the receipt, or an attested copy thereof, to the register of the court of chancery, to be filed there.

4. The undertaker shall next cause all the printed copies to be indorsed, or marked, in some convenient part, with the name of one trustee (or more), written with his own hand, and the time of signing.

5. And he shall also cause them to be stamped with a proper stamp, to be made for that purpose, and kept by the register of the court of chancery. And if any person shall counterfeit the stamp, he shall be set in the pillory for an hour.

6. This done, he shall, with all convenient speed, send or deliver them to the churchwardens or chapelwardens, and to the teachers and preachers of every separate congregation, and to any person who hath taught or preached among quakers.

7. Which persons, immediately after receipt, shall indorse the time of receiving, and set their names.

8. Then the churchwardens or chapelwardens shall forthwith deliver them to the minister.

9. And the ministers, on receipt, shall indorse the time, and set their names.

10. Then the ministers (and teachers respectively), in two months after receipt, shall, on some Sunday, immediately before sermon, openly read or cause them to be read to the congregation.

11. Then the churchwardens and chapelwardens (and teachers and others to whom they were delivered) shall collect the money that shall be freely given, either in the assembly, or by going from house to house, as the briefs require.

[252] 12. Next; the sum collected, the place where, and time when, shall be indorsed, fairly written in words at length, according to the form to be printed on the back of each brief, and signed by the minister and churchwardens, or by the teacher and two elders, or two other substantial persons of such separate congregation.

13. Afterwards, on request of the undertaker (or other person by him lawfully authorized), which he is required to make within six months after the briefs were first delivered into the respective parishes, on pain of 20*l.* to be recovered by action at law, —— the churchwardens and teachers shall deliver to him the briefs so indorsed, and the money thereon collected, taking his receipt for the same in some book to be kept for that purpose.

14. Every minister, curate, teacher, preacher, churchwarden, chapelwarden, and quaker, refusing or neglecting to do any thing

above required, shall forfeit 20*l.*; to be recovered by action of debt, bill, plaint, or information.

15. And in every parish or chapelry, and separate congregation, a registry shall be kept by the minister or teacher of all monies collected by virtue of such briefs, therein also inserting the occasion of the brief, and the time when collected; to which all persons at all times may resort without fee.

16. And the undertaker shall enter in a book the number of briefs; when signed and sent, and whither and when received back.

17. And the briefs so received back shall be deposited by him with the register of the court of chancery. And if the whole number shall not be returned, the undertaker, for every one not returned (through default of him or his agents), shall forfeit 50*l.*; unless he shall prove that it was lost or destroyed by inevitable accident; and shall pay the money collected thereon.

18. And the undertaker, in two months after he has received the money, and after notice thereof to the sufferers, shall account before a master in chancery; and shall be allowed all just charges.

19. And if any shall purchase or farm charity money on briefs; such contract shall be void, and the purchaser shall forfeit 500*l.* to be recovered by action at law; the same to be applied (as also the other penalties) to the use of the sufferers. (4)

The usual charges of suing out a brief, with the collections thereupon, may be best understood from an instance given.

For the parish church of Ravenstondale in the county of Westmoreland. [253]

	£.	s.	d.	£.	s.	d.
Lodging the certificates - -	0	7	6			
Fiat and signing - - -	19	4	2			
Letters patent - - - -	21	18	2			
Printing and paper - - -	16	0	0			
Teller and porter - - - -	0	5	0			
Stamping - - - -	13	12	6			
Copy of the brief - - - -	0	5	0			
Portage to and from the stampers -	0	5	0			
Matts, &c. for packing - -	0	4	0			
Portage to the waggons - -	0	4	0			
Carriage to the undertaker at Stafford	1	11	6			
Carry forward -	£73	16	10			

(4) Where some of the undertakers are dead, in a bill for an account their representatives need not be brought before the court; for they are answerable for one another. *Exp. Angel.* 2 *Atk.* 162. *Barn. Ch. Rep.* 423.

	£.	s.	d.	£.	s.	d.
Brought forward -	78	16	10			
Postage of letters and certificate -	0	4	8			
Clerk's fees - - - -	2	2	0			
Total of the patent charges - -				76	3	6
Salary for 9986 briefs at 6*d.* each - - -				249	13	0
Additional salary for London - -				5	0	0
The whole charges - - -				330	16	6

	£.	s.	d.
Collected on 9986 briefs - -	614	12	9
Charges - - - -	330	16	6
Clear collection - -	283	16	3

Collections - -	9986
Blanks - - - -	503
Total number of briefs -	10489

Bruera.

BRUERA, in the French *bruyere*, in domesday-book called *bruæria*, is an unprofitable kind of ground, but not wholly barren; for thereon sheep and beasts will *browse*; and some poor people apply the flags and turfs thereof for fewel. And this kind of heath ground cannot without great skill, charge, and
[254] industry, be converted to tillage; and therefore by the statute of the 2 & 3 *Ed.* 6. *c.* 13. it is discharged from the payment of hay and corn tithes for seven years after the improvement. It sendeth a flower in autumn (when all others cease) which bees do exceedingly covet. Some say it is a kind of wild tamarisk. And in Lincolnshire, a religious house was called *Temple bruer*; because it was seated in the heath.

And this is no other than what in the northern parts of England is called *ling*.

Buggery.

What it is. 1. BUGGERY is a detestable and abominable sin, committed by carnal knowledge against the ordinance of the Creator

and order of nature, by mankind with mankind, or with brute beasts, or by womankind with brute beasts. 3 *Inst.* 58.

2. By the 25 *H.* 8. *c.* 6. (5) Forasmuch as there is not yet sufficient and condign punishment appointed by the laws of this realm, for the detestable and abominable vice of buggery committed with mankind or beast; it is enacted, that the same offence shall be felony without benefit of clergy; and the justices of the peace shall have power to hear and determine the same, as in cases of other felonies. **Punishment.**

3. If the party buggered be within the age of discretion, it is no felony in him, but in the agent only. 3 *Inst.* 59. **Infants.**

4. The statute making it felony generally, there may be accessaries both before and after. 1 *H. H.* 670. **Accessary.**

But those that are present, aiding, and abetting, are all principals. *Id.*

And although none of the principals are admitted to their clergy, yet accessaries both before and after are not excluded from clergy. *Id.*

5. By the 22 *G.* 2. *c.* 33. *Art.* 29. If any person in the fleet shall commit the unnatural and detestable sin of buggery or sodomy with man or beast; he shall be punished with death, by the sentence of a court martial. **Navy.**

6. In the case of *Higgon* and *Coppinger*, *T.* 9 *C.* where the defamation, for which suit was defending in the spiritual court, was buggery, and prohibition prayed; the court granted it, by reason that the offence was made felony: and there being no saving in the act for the spiritual jurisdiction, the spiritual court could not have cognizance of the principal offence nor by consequence of the defamation arising from it. *W. Jones*, 320. *Gibs.* 1080. [255] **Prohibition.**

Bull.

BULL, *bulla*, was a brief or mandate of the pope or bishop of Rome; so called from the seal of lead, or sometimes of gold, affixed to it. To procure, publish, or put in ure any of these, is by act of parliament made high treason. (6)

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(5) Continued 28 *H.* 8. *c.* 6. 31 *H.* 8. *c.* 7.; made perpetual 32 *H.* 8. *c.* 3.; amended 2 & 3 *Ed.* 6. *c.* 29.; repealed with 2 & 3 *Ed.* 6. *c.* 29. by 1 *Mary*, *st.* 1. *c.* 1. § 5.; and revived 5 *El.* *c.* 17.

(6) *Bulla* is said by some to mean a little bladder, whence it was applied to any tumour, as the boss of a nail and a button or ornament to unite the different parts of a garment, and thence transferred to that seal which was affixed in a somewhat similar shape to these mun-

[illegible]l,

Original of burying places. [See Church, V.]

1. AS to the original of burying places, many writers have observed, that at the first erection of churches, no part of the adjacent ground was allotted for interment of the dead, but some place for this purpose was appointed at a further distance. Especially in cities and populous towns, where, agreeable to the old Roman law of the twelve tables, the place of the inhumation was without the walls, first indefinitely by the way side, then in some peculiar inclosure assigned to that use. Therefore the Roman pontifical, amongst other inventions, is in this matter convicted
[256] of error, that it makes pope Marcellus under the tyrant Maxentius appoint twenty-five churches in Rome to bury martyrs in; when at that time laws and customs did forbid all burial within the city. Hence the Augustine monastery was built without the walls of Canterbury (as Ethelbert and Augustine in both their charters intimate) that it might be a dormitory to them and their successors the kings and archbishops for ever. This practice of remoter burials continued to the age of Gregory the great, when the monks and priests beginning to offer for souls departed, procured leave for their greater ease and profit, that a liberty of sepulture might be in churches, or in places adjoining to them. This mercenary reason seems to be acknowledged by pope Gregory himself, whilst he allows, that when the parties deceasing are not burthened with heavy sins, it may then be a benefit to them to be buried in churches because their friends and relations, as often as they come to these sacred places, seeing their graves, may remember them, and pray to God for them. After this, Cuthbert archbishop of Canterbury brought over from Rome this practice into England about the year 750, from which time they date the original of churchyards in this island. This was a sufficient argument of the learned Sir Henry Spelman, to prove an inscription at Glastonbury to be a later forgery, because it pretends *dominus ecclesiam ipsam cum cœmiterio dedicarat*; whereas there was no cœmitery in England till above 700 years after the date of that fiction. The practices of burying within the churches, did indeed (though more rarely) obtain before the use of churchyards, but was by authority restrained when churchyards were frequent and appropriated to that use. For among those canons which seem to have been made before Edward the confessor, the ninth bears this title, *De non sepeliendo in ecclesiis*, and begins with a confession that such a custom had prevailed, but must be now reformed, and no such liberty allowed for the future; unless the

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dates of the popes. *God. Con. Rep.* 841. Others, with greater probability, derive the word from the Greek [illegible], concilium. *Spelm. in Verb.*

person be a priest or some [illegible] who by the merits of his past life might deserve such a peculiar favour. However, at the first it was the nave or body of the church, that was permitted to be a repository of the dead, and chiefly under arches by the side of the walls. Lanfranc archbishop of Canterbury seems to have been the first who brought up the practice of vaults in chancels, and under the very altars, when he had rebuilt the church of Canterbury about the year 1075. *Ken. Par. Ant.* 592, 593.

2. No person may be buried in the church, or in any part of it, without the consent of the incumbent. (7) In some of the foreign canons, it is said, without consent of bishop and incumbent; in others, without consent of bishop *or* incumbent. But our common law hath given this privilege to the parson only, exclusive of the bishop, in a resolution in the case of *Frances* v. *Ley*, *H.* 12 *Ja.* (*Cro. Ja.* 367.) that neither the ordinary himself, nor the churchwardens, can grant licence of burying to any within the church, but the parson only; because the soil and freehold of the church is only in the parson, and in none other. Which right of giving leave will appear to belong to the parson, not as having the freehold (at least not in that respect alone), but in his general capacity of incumbent, and as the person whom the ecclesiastical laws appointed the judge of the fitness or unfitness of this or that person, to have the favour of being buried in the church. For antiently (as was said) the burying not only in temples and churches, but even in cities, was expressly prohibited. And afterwards when the burying in churches came to be allowed and practised, the canon law directeth, that none but persons of extraordinary merit shall be buried there; of which merit (and, by consequence, of the reasonableness of granting or denying that indulgence) the incumbent was in reason the most proper judge, and was accordingly so constituted by the laws of the church, without any regard to the common-law notion of the freehold's being in him, which if it proves any thing in the present case, proves too much; that neither without the like leave, may they bury in the churchyard, because the freehold of that is also declared to be in him. *Gibs.* 453. [*Wats. c.* 39. *p.* 387.] [257] **Burying in the church.**

Upon the like foundation of freehold, the common law hath one exception to this necessity of the leave of the parson: namely,

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(7) No fee is due for burial of common right; but where, as in this case, a licence is necessary, the person giving it may stand on his own price: and if an alleged custom to charge a certain fee is denied, it is triable at common law, and prohibition shall be granted; but if not denied, the spiritual court shall proceed. *Dean and Chapter of Exeter's case*, 1 *Salk.* 334. *Fruin* v. *Dean*, *&c. of York*, 3 *Keble*, 777. And if a fee is due by custom, the duty must be done. *Bourdeaux* v. *Dr. Lancaster and another*, 1 *Salk.* 332.

where a burying-place within the church is prescribed for as belonging to a manor-house, the freehold of which they say is in the owner of that house, and that by consequence he hath a good action at law, if he is hindered to bury there. *Gibs.* 453. (8)

Yet, nevertheless, the churchwardens also by custom may have a fee for every burial within the church; by reason the parish is at the charge of repairing the floor. *Wats. c.* 39. (9)

But there is good reason, that any parishioner, at his discretion, shall not have the liberty of burying there: especially upon account of the health of the inhabitants to be assembled there for religious worship.

[258] **Burying in the churchyard.** 3. The reason given by Gregory the great, why it was more profitable to be buried within the precincts of the church, than at a distance, was, because their neighbours, as often as they come to those sacred places, remembering those whose sepulchres they behold, do put forth prayers for them unto God. Which reason was afterwards transferred into the body of the canon law. And this superstition of praying for the dead, seems to have been the true original of churchyards, as incompassing, or adjoining to the church. Which being laid out and inclosed for the common burial-places of the respective parishioners, every parishioner hath and always had a right to be buried in them. *Gibs.* 453. (*a*)

For by the custom of England, any person may be buried in the churchyard of the parish where he dies, without paying any thing for breaking the soil. *Degge, P.* 1. *c.* 12. (*b*)

But ordinarily, it seemeth that a person may not be buried

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(8) A man may prescribe, that, as tenant of an ancient messuage, he ought to have separate burial in such a vault within the church, or in such an aisle, or in the choir; and if he be disturbed, he may have an action on the case. *Harvey's* case, cited *Dawney* v. *Dee, Cro. Jac.* 604. But a custom, that every parishioner has a right to bury his dead relations in the churchyard, as near their ancestors as possible, is bad. *Fryer* v. *Johnson,* 2 *Wils.* 28.

(9) *Andrews* v. *Simons,* 3 *Keble,* 504. *Anonymous,* 1 *Ventris,* 271. By usage about London the churchwardens take the money for burying in the church or churchyard, and the parson has nothing but for burial in the chancel. *Anon.* 2 *Shower,* 184.

(*a*) [Burial was the usual character of a parochial church. *Seld. de Dec. c.* 9. § 4.] Concerning churchyards, see tit. Church, V.

(*b*) [*Andrews* v. *Cawthorne, Willes,* 536.] But a fee may be due by prescription, or immemorial custom. *Ib.* Vide *infra,* 9. [and 257 note (1).]

In the case of *The King* v. *Taylor* [7 *G.* 1. *B. R. Willes Rep.* 588. *note*], it was held that information was grantable against a parson for opposing [*qu.* neglecting] the burial of a parishioner in the churchyard; but, as to refusing to read the service over the deceased, *because he was never baptised,* the court would not interpose, that being a matter cognizable in the ecclesiastical court. *Serj. Hill's MSS.* (7 D. 278.)

in the churchyard of another parish than that wherein he died, at least without the consent of the parishioners or churchwardens, whose parochial right of burial is invaded thereby, and perhaps also of the incumbent whose soil is broken: as in the case of the churchwardens of *Harrow on the Hill* (1), it is said, that upon a process against them for suffering strangers to be buried in their churchyard, and their appearing and confessing the charge, they were admonished by the ecclesiastical judge, not to suffer the same for the future.

But where a parishioner dieth in his journey, or otherwise, out of the parish, perhaps it may be otherwise: as it seemeth to be, where there is a family vault or burying place, in the church, or chancel, or aisle thereof. (2)

Whether burial may be hindered for debt.

4. By the civil law, dead bodies ought not to be hindered from burial for debt, as vulgarly supposed; which seemed to be allowed by the law of the twelve tables. *Wood. Civ. L.* 143, 144. 2 *Domat*, 628. (c)

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(1) *Thompson* v. *Saunders*, *Perkins*, 1740. *cor.* Dr. *Bettesworth*, sen.; and see lord *Stowell*'s observation in *Bardin* v. *Calcott*, 1 *Hagg. Rep.* 17.

(2) See 257. *note* (9). An agreement having existed between the successive vicars and churchwardens of a parish, that certain fees should be taken on the burial of strangers in the churchyard, and divided equally between them; an incoming vicar refuses to accede to that agreement, and prevails on the collector of the fees to pay over to him the whole he has in his hands: it was held that the collector, having received one half of these fees to the use of the churchwardens, they are entitled to recover that moiety from the vicar in an action for money had and received. *Littlewood* v. *Williams clerk*, 1 *Marsh. Rep.* 589. 6 *Taunt.* 277. S.C. An action for money had and received is not maintainable to recover a sum of money paid to a churchwarden for burial dues, which he had paid over to a treasurer of the trustees of a chapel previous to the commencement of the action. *Horsfall* v. *Handley*, 2 *B. Moore*, *Rep.* 5.

(c) No law of the twelve tables handed down to us allows a dead body to be arrested for debt, although a famous law of the third table gave to creditors, according to most interpreters, a singular power of cutting into pieces the body of a living debtor, who after a certain process refused to pay. On the contrary, the tenth table prescribes imperatively the various solemnities which were to be observed in the burial of the dead; and a law of the *Digest* protects from *citation* even persons who are employed in performing the funeral rites. *Dig.* 2. 4. 2. That this, however, had been attempted in later times, probably (to use the expression of lord Mansfield on another subject *) in order to *torture the compassion of friends*, is apparent from the rescript of the emperor Justin, which enacts, that obligations entered into on that account shall be void, and inflicts a penalty on those who exact

* *Doug. Rep.* 696

And *Lindwood* says, heretofore the law was, that the burial of a dead person might be delayed for debt; but this was after-
[260] wards abolished; for death dissolved all things; and albeit a man in his lifetime may in some cases be imprisoned for debt, yet his dead body shall not be disturbed. *Lind.* 278.

And this seemeth to be implied in the statute of the 32 *G.* 2.

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them. *Cod.* 9. 19. 6. *cum Authen.* add *Nov.* 60. (which renders the creditors infamous), with the Exposition of *Cujacius, tom.* 3. But *Huber,* although he is clear that a dead body cannot be kept from burial, thinks that creditors may, by an arrest, prevent the relations of the deceased from carrying the corpse to a distant family monument. His words are, *Hactenus religio tenet ne sepultura impediatur ; quo minus autem si cognati alio cadavera transferre, monumentisque avitis inferre velint id arresto impediatur nihil obstare videtur, neque non sit aliquando. Prælect. ad Pand. Lib.* 2. *Tit.* 2. *de Arresto personali.* 6. The funeral of Sir Barnard Turner, in 1784, proceeding from London to Hertfordshire, was said to have been stopped by an arrest of his body, till his friends entered into engagements for his debts. But whether this could be done legally may well be doubted: for that such an arrest cannot be made on *mesne process* to compel an appearance, is clear from the nature of the thing itself, and from the statute of *Geo.* 2. quoted by our author: and that a dead body cannot be taken in execution on a *capias ad satisfaciendum* should appear from this, that though the writ directs the sheriff to have the *body of the debtor* at Westminster on the day of the return, without specifying whether he be dead or living, yet it states the reason to be, *in order to satisfy the plaintiff for his debt.* But, by the death of the debtor, all his property is vested in others, namely, his heir and personal representatives. he cannot, therefore, satisfy the creditor out of his property, and that his body after death can be no satisfaction, seems to be the opinion of the legislature in the stat. 21 *J.* 1. *c.* 24., which provides that if a debtor die in execution, the persons at whose suit he stands charged may sue out new execution against his lands and goods.

[The case cited by *Hyde* C. J. in *Quick* v. *Copleton*, 1 *Levinz*, 161. 1 *Sid.* 242. 1 *Keb.* 866., that a woman who feared the dead body of her son would be arrested for debt, was holden liable on a promise to pay in consideration of forbearance, though she was neither executrix nor administratrix, and of which the other judges are said to have doubted, was thus forcibly repudiated by lord *Ellenborough*, in *Jones* v. *Ashburnham*, 4 *East*, 460. and 465: "It is impossible to contend that this last forbearance could be a good consideration for an *assumpsit:* for to seize a dead body upon any such pretence would be *contra bonos mores*, and an extortion on the relatives. It is contrary to every principle of law and moral feeling. Such an act is revolting to humanity and illegal; and therefore any promise extorted by the fear of it could never be valid in law. It might as well be said, that a promise in consideration that one would withdraw a pistol from another's breast could be enforced against the party acting under such unlawful terror."]

c. 28., which requires the bailiff arresting any person for debt not to carry him to any alehouse or other such place without his free consent; and requires the bailiff to deliver to the person arrested, a copy of the clauses in the said act relating to arrests; and many other such particulars; none of which are in any respect applicable to a dead person.

But although the interment of a dead person may not be hindered for debt, yet after attainder for treason or felony, and before execution, a person, though in some respects he is said to be *civiliter mortuus*, yet is liable to be charged at the suit of his creditors. As was the case of *Æneas Macdonald*, attainted of treason committed by him in the year 1745. Upon which occasion Sir *Michael Foster* observes, that the person of a man under attainder is not absolutely at the disposal of the crown. It is so for the ends of public justice, but for no other purpose. The king may order execution to be done upon him according to law, notwithstanding he may be charged in custody at the suit of creditors. But till execution is done, his creditors have an interest in his person for securing their debts. And he himself, as long as he liveth, is under the protection of the law. To kill him without warrant of law is murder: for which the murderer is liable to a prosecution at the suit of the crown, and likewise to an appeal at the suit of the widow. For though his heir is barred by the attainder, which corrupteth his blood, and dissolveth all relations grounded on consanguinity, yet the relation grounded on the matrimonial contract continueth till death. And if a person under an attainder be beat or maimed, or a woman in the like circumstances ravished, they may, after a pardon, maintain an action or appeal, as their cases respectively may require. And though before a pardon, they are disabled to sue in their own names, there seems to be no doubt but that they are entitled to prosecute, according to the nature of their respective cases, in the name of the king; who will do equal right to all his subjects. *Foster's Crown Law*. 62.

[Burial of attainted traitors or felons.]

In the same year 1745, a remarkable case happened after the rebel assizes at Carlisle, where some of the rebels died after their attainder, and before execution. The question was, Whether they should be admitted to christian burial? And the then lord bishop of the diocese requested the opinion of a very learned gentleman; who made the following remarks and extracts for his lordship's consideration: [261]

It is certain, that after execution, the bodies being at the king's disposal, are, for the public example, and for the greater terror unto others, never admitted to christian burial; and this seemeth to have been the law of the church of England from two ancient canons, by the former of which it is ordained as follows; Concerning those who by any fault inflict death upon themselves, let there be no commemoration of them in

the oblation, as likewise for them who are punished for their crimes; nor shall their corpses be carried unto the grave with psalms. By the latter —— If any shall voluntarily kill himself by arms, or by any instigation of the devil, it is not permitted that for such a person any masses be sung, nor shall his body be put into the ground with any singing of a psalm, nor shall he be buried in pure sepulture. The same shall be done to him, who for his guilt endeth his life by torments, as a *thief* (1), murderer, and betrayer of his lord. *Canones editi sub Edgaro rege: Wilk. Concil.* V. 1. *p.* 225. 232. *Johns.* A. D. 740. No. 96. and A. D. 963. No. 24.

But *before* execution, the case seemeth to be different. Mr. *Hawkins* says, that judgment in high treason is, that he shall be carried back to the place from whence he came, and from thence be drawn to the place of execution, and be there hanged by the neck, and cut down alive, and that his entrails be taken out and burnt before his face, and his head cut off, and his body divided into four quarters and *disposed of at the king's pleasure.* 2 *Haw.* 443.

And lord *Coke* says; Albeit judgment be given against a man in case of treason or felony, yet his body is not forfeited to the king, but *until execution remaineth his own;* and therefore before execution, if he be slain without authority of law, his wife shall have an appeal; for notwithstanding the attainder he remained her husband. 3 *Inst.* 215.

So if a man commit treason, and after judgment become of non-sane memory, he shall not be executed: for it cannot be example to others. 3 *Inst.* 4.

So if the gaoler keep a prisoner more straightly than he ought of right, whereof the prisoner dieth, this is felony in the gaoler

[262] by the common law; and this is the cause, that if a prisoner die in prison, the coroner ought to sit upon him. 3 *Inst.* 91.

And particularly that the church admitted such persons to christian burial, seemeth somewhat evident, in that she admits them to the receiving of the holy communion, and other rites of the church, during the time of their condemnation, and approves of the ministers of the church of England attending them to the last extremity.——— And these rebels were admitted to christian burial.

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(1) But the rubric confirmed by statute 13 & 14 *Car.* 2. *c.* 4. § 1, 2. does not recognize this distinction. See the rubric, *infra,* 6. *note.* The cases of treason and murder are on a peculiar footing as to the disposal of the bodies. Hanging in chains, even for murder, cannot form part of the judgment, but *may* be directed by a special order of the judge to the sheriff (*Foster,* 107. cited 4 *Bl. Com.* 202. *note* (6), by *Chr.*), as is still sometimes practised in case of notorious thieves. 4 *Bl. Com.* 202.

[The *mode* of burying the dead is a matter of ecclesiastical cognizance; and therefore when the question was, whether a parishioner had a right to be buried in the parish churchyard in an iron coffin, which was a new and unusual mode, the court of K. B. refused a mandamus. (2)

Burying in iron coffins, woollen, &c.

The first act for burying in woollen, *viz.* 18 *C.* 2. *c.* 4., was repealed by 30 *C.* 2. *st.* 1. *c.* 3. and 32 *C.* 2. *c.* 1.; which latter acts were both repealed 54 *G.* 3. *c.* 108.

Burying in woollen.

The Stat. 48 *G.* 3. *c.* 75. "For providing suitable interment in "churchyards or parochial burying-grounds in England for such "dead human bodies as may be cast on shore from the sea, in "cases of wreck, or otherwise," enacts,

Burial of dead bodies cast ashore from the sea.

By § 1. That the churchwardens and overseers of the poor in any parish in England in which any dead human body is cast on shore from the sea, by wreck or otherwise, shall, upon notice thereof given to them, cause such body to be conveyed to some convenient place, and with all speed cause it to be interred in the parish churchyard or burial-ground, so that the expences thereof do not exceed the sum allowed by such parish for the burial of persons buried at the expence of the parish; but if such body is cast on shore in any extra-parochial place, where there are no churchwardens, &c., such notice shall be given to the constable or headborough thereof, who shall proceed as before directed in case of churchwardens, &c.

By § 2. That every minister, parish clerk, and sexton shall perform the duties customary in other funerals, and admit the body to be buried in the parish burial ground, receiving the like fees as in cases of burials at the expence of the parish.

By § 3. That every person who shall find any such body on the shore, and within six hours after give notice thereof to such churchwardens or overseers, or constable or headborough, as the case may be, or shall leave the same at their usual abode, shall be entitled to five shillings for his trouble, to be forthwith paid to the person giving the first notice only; but no greater sum shall be given for one notice, though there may be more bodies than one.

By § 4. That all persons finding such bodies on the shore, and neglecting within six hours after to give or leave such notice, shall forfeit five pounds.

By § 5. That all charges attending the execution of this act shall be paid by the churchwardens, overseers, constable or headborough for the time being of such parish or place.

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(2) *The King* v. *Coleridge and others*, 2 *Bar.* & *Ald.* *Rep.* 806. 1 *Chitt. Rep.* 588. S. C.; and see 3 *Inst.* 303.; and the final disposal of this case, *infra*, 9. *note* (5). But they will grant an information against a parson for neglecting the burial of a parishioner in the churchyard. *The King* v. *Taylor*, 7 *G.* 1. *B. R. Willes's Rep.* 538. *note.*

By § 6. That one justice for the county or place in which such bodies are buried, shall, by writing under his hand, direct the treasurer of the county to pay to such churchwardens, constable, &c. such sum for his expences about the execution of this act as he may deem reasonable, after the same have been verified on oath; and such treasurer shall pay the same, and be allowed it in his accounts.

By § 7. That every churchwarden, constable, &c. neglecting to remove such bodies from the sea-shore prior to interment for 12 hours after notice given or left in writing at his abode, or to perform the other duties hereby required of them, shall forfeit for each offence five pounds.

By § 8. That all penalties incurred under this act, if not paid on conviction, shall be levied by distress and sale of the offender's goods, by warrant under the hand and seal of any justice for the county or place where the offence happens (which warrant such justice may grant on confession or on evidence of one witness on oath), and the surplus money arising by such distress, &c. shall be returned to the owners, after deducting the costs of such distress, &c. and when paid shall go to the informers; and if no sufficient distress shall be found, or if the penalty is not forthwith paid, such justice by like warrant may commit the offender to the common gaol or house of correction for the county or place, without bail, for not exceeding two calendar months, nor less than fourteen days, unless the penalty and charges be sooner paid.

By § 9. Conviction for offences against this act shall be in form or to the effect therein provided, *viz.*

BE it remembered, that on ——— this day of ——— in the ——— year of the reign of ——— A. B. is convicted before ——— one of his majesty's justices of the peace for the ——— of having [as the offence shall be] *and I the said ——— do adjudge him* [or *them*] *to forfeit and pay for the same the sum of ———.*

Given under my hand and seal the day and year aforesaid.

By § 10. That any person aggrieved by any thing under this act, may appeal to the quarter sessions holden for the county or place, one calendar month after the cause of such appeal arose, on giving ten days' notice of his intention so to do, and the matter thereof; appellee, after notice, entering into recognizance before some justice of the county or place, with sufficient sureties, conditioned to try such appeal, and abide the order and award of the court thereon; and such sessions, on proof of notice and recognizance given and entered into, shall determine such appeal in a summary way, and award costs to either party, or otherwise; and may mitigate the penalty, and order further reasonable satisfaction to be made to the party injured, and such their determination shall be binding and conclusive.

By § 11. That in case of any distress under this act the same shall not be deemed unlawful, or the parties trespassers, for any defect or want of form in the information, summons, conviction, warrant of distress, or other proceedings thereon, nor trespassers *ab initio* from any irregularity that shall be afterwards done by them; but the party injured thereby may recover satisfaction by action on the case.

By § 12. That all penalties and expences attendant thereon incurred under this act, shall be paid by the person incurring the same; and the parish or place wherein such person ought to have acted in his duties under this act shall be exempted therefrom.

By § 13. That the lords of manors throughout England shall pay to the churchwardens, constables, &c. of such parishes or places, such sums as they were accustomed to pay for placing any such bodies into the ground in the state in which they were found: such sums to go in part discharge of the expences incurred under this act, and credit to be given for the same by such churchwardens, &c. in their accounts with the county.

By § 14. That the quarter sessions may cause such sums as may be necessary for the purposes of this act to be raised as county rates under 12 *G.* 2. *c.* 29. are directed to be.]

6. *Can.* 68. No minister shall refuse or delay, to bury any corpse that is brought to the church or churchyard (convenient warning being given him thereof before,) in such manner and form as is prescribed in the book of common prayer. And if he shall refuse so to do, except the party deceased *were denounced excommunicated*, majori excommunicatione, for some grievous and notorious crime, and no man able to testify of his repentance: he shall be suspended by the bishop of the diocese from his ministry, by the space of three months. [265] Minister not to refuse burial.

Were denounced excommunicated] But by the rubric (3) before the office for burial of the dead, the said office likewise shall not be used for any that die unbaptized (4), or that have laid violent hands upon themselves.

(3) Confirmed by statute 13 & 14 *Car.* 2. *c.* 4. § 1. 2.

(4) In *Kemp* v. *Wickes clerk*, *Arches*, Dec. 11. 1809, *cor.* Sir *John Nicholl*, the baptism of a child by a dissenting minister was held a sufficient baptism to entitle the child to christian burial by a minister of the church of England. The court recognized this important question as one of disability and exclusion of all dissenting subjects from the general right of burial by the established church, and rested its judgment, 1st, on the canon law, rubrics, and practice affecting lay baptism before the act of toleration; 2dly, on the act of toleration itself; and generally, on every ground of public and ecclesiastical policy. It declared, that by the above statute the acts of nonconformists, for the purposes of their own worship, are legalized under certain regulations, and are to be recognized in courts of law. Indeed the

And no man able to testify of his repentance] But where sufficient evidence did appear to the bishop of such person's repentance, commissions have been granted, both before and since the Reformation, not only to bury persons who died excommunicate, but in some cases to absolve them, in order to christian burial. *Gibs.* 450.

[266] There were anciently other causes of refusal of burial, particularly of *heretics*, against whom there was an especial provision in the canon law, that if they continued in their heresy, they should not have a christian burial; of which we have a remarkable instance a little before the Reformation in the case of one Tracey, who was publicly accused in convocation of having expressed heretical tenets in his will: and being found guilty, a commission was issued to dig up his body, which was accordingly done.

Also persons *not receiving the holy sacrament*, at least at *Easter*, were excluded from christian burial by a decree of the fourth Lateran council, which became afterwards a law of the English church.

In like manner, persons killed in *duels, tilts*, or *tournaments*.

But at this day it seemeth, that these prohibitions are restrained to the three instances before mentioned; of *persons excommunicate, unbaptized, and that have laid violent hands upon themselves.* (5)

And of this last sort are to be understood, not all who have procured death unto themselves, but who have done it voluntarily, and consequently have died in the commission of a mortal sin; and not idiots, lunatics, or persons otherwise of insane mind.

The first ecclesiastical rule which occurreth as to this matter is the 34th canon of the first council of *Braga*, in the year 563; which forbids any burial service for those *qui violentam sibi ipsis inferunt mortem.* But in *Wilkins's Councils*, vol. 1. p. 129. the fifth chapter of the second book of the *Penitential* of *Egbert* archbishop of York, written about the year 750 (which chapter is plainly taken from the canon of *Braga*), adds this limitation, *If they do it by the instigation of the devil.* And at p. 232. the fifteenth of the canons published in king Edgar's time, about the year 960, adds a further limitation, *If they do it "voluntarily" by*

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baptisms of dissenters have been expressly recognized by stat. 25 *G.* 3. *c.* 75. which extended the stamp duty on registers of church of England baptisms to registers of baptisms of protestant dissenters. See the *Report of this case*, published by *Butterworth*, 1810.

(5) See the rubric before the office of burial, which is in this form: "Here it is to be noted that the office ensuing is not to be used for "any that die unbaptized, or excommunicate, or have laid violent "hands on themselves." This rubric is confirmed by stat. 13 & 14 *C.* 2. *c.* 4. § 1, 2.

the instigation of the devil. These two authorities *Wheatley on the Common Prayer* quotes from *Johnson's* collection, to prove that our old ecclesiastical laws made no exception in favour of those who kill themselves in distraction. But they prove, even as they stand in *Johnson*, that such were not comprehended under those laws. And, accordingly, the *Decretum* of *Gratian*, *part* 2. *caut.* 23. *qu.* 5. *cap.* 12. inserting the canon of *Braga*, adds to it *voluntarie*. And the note there is, *secus, si per furorem: tunc non imputaretur.*

Now we should not, without necessity, understand our own rubric to be so much severer than the preceding constitutions, as to place mad people in the same rank with excommunicate and unbaptized persons, and to punish a poor creature for what in him indeed was no crime. [267]

The proper judges, whether persons who died by their own hands were out of their senses, are, doubtless, the coroner's jury. (*d*) The minister of the parish hath no authority to be present at viewing the body, or to summon or examine witnesses. And therefore he is neither entitled nor able to judge in the affair, but may well acquiesce in the public determination without making any private inquiry. Indeed, were he to make one, the opinion which he might form from thence could usually be grounded only on common discourse and bare assertion. And it cannot be justifiable to act upon these, in contradiction to the decision of a jury after hearing witnesses upon oath. And though there may be reason to suppose that the coroner's jury are frequently favourable in their judgment, in consideration of the circumstances of the deceased's family with respect to the forfeiture, and their verdict is in its own nature traversable (*e*); yet the burial may not be delayed, until that matter upon trial shall finally be determined. But on acquittal of the crime of self-murder by the coroner's jury, the body in that case not being demanded by the law, it seemeth that a clergyman may and ought to admit that body to christian burial.

[By 4 *G.* 4. *c.* 52. § 1. it is enacted, That from and after 8th July, 1823, it shall not be lawful for any coroner or other officer having authority to hold inquests to issue any warrant or other process directing the interment of the remains of persons against whom a finding of *felo de se* shall be had, in any public highway; but

(*d*) Or if the body cannot be viewed, the justices in session may enquire of the felony. 3 *Inst.* 55. But their finding is traversable.

(*e*) The inquisition of the coroner, upon view of the body, is not traversable by the executors or administrators of the deceased; but evidence shall be heard by him to prove the deceased *non compos*, which, if he refuse, the inquisition may be quashed by the King's Bench, who are the sovereign coroners. 3 *Inst.* 55. 1 *H. P. C.* 415.

such coroner or other officer shall give directions for the private interment of the remains of such person *felo de se*, without any stake being driven through the body of such person, in the churchyard or other burial-ground of the parish or place in which the remains of such person might by the laws or custom of England be interred, if the verdict of *felo de se* had not been found against such person: such interment to be made within twenty-four hours from the finding of the inquisition, and to take place between the hours of nine and twelve at night.

By § 2. Nothing herein shall authorize the performing any of the rites of christian burial on the interment of the remains of any such person, or alter the laws or usages relating to the burial of such persons, except so far as it relates to the interment of such remains in such churchyard or burial-ground at such time and in such manner as aforesaid.]

Office of burial.

7. By the rubric; the priests and clerks meeting the corpse at the entrance of the churchyard, and going before it either into the church, or towards the grave, shall say as is there appointed.

By which it seemeth to be discretionary in the minister,
[268] whether the corpse shall be carried into the church or not. And there may be good reason for this, especially in cases of infection.

Ringing at funerals.

8. *Can.* 67. After the party's death, there shall be rung no more but one short peal, and one before the burial, and one other after the burial.

Fee for burial.

9. Langton. *We do firmly injoin, that burial shall not be denied to any one, upon the account of any sum of money: because if any thing hath been accustomed to be given by the pious devotion of the faithful, we will that justice be done thereupon to the churches by the ordinary of the place afterwards.*

Shall not be denied] Or delayed. *Lind.* 278.

Upon the account of any sum of money] For burial ought not to be sold: but albeit the clergy may not demand any thing for burial, yet the laity may be compelled to observe pious and laudable customs. (6) But in such case the clerk must not demand

(6) *Andrews* v. *Cawthorne*, *Willes*, 536. Thus in the case of *Gilbert* v. *Buzzard and Boyer*, 2 *Hagg. Rep.* 333., patent iron coffins were admitted to be buried at an increased rate of payment to the parish for the longer occupation of the ground, presumed from the durability of the material used. A table of increased fees for interment in *metallic* coffins in St. Andrew's parish, Holborn, was signed. No mere analysis can do justice to the chastened and classic language, or to the enlightened and philosophic arguments of lord *Stowell*, in his judgment in the case; but the following extract, as to the adjustment of the *quantum* of increased fees for burial, must be acceptable in a practical point of view: —" I am aware, as I have already intimated, that very ancient canons forbid the taking of money upon interment, upon the notion that consecrated grounds are amongst the

any thing for the ground, or for the office; but if he shall allege that for every dead person so much hath been accustomed to be given to the minister or to the church, he shall recover it. *Lind.* 278. [*Stephan. in conc. Oxon. prim. de Simoniâ.*]

Hath been accustomed to be given] That is, of old, and for so long time as will create a prescription, although at first given voluntarily. For they who have paid so long, are presumed at first to have bound themselves voluntarily thereunto. *Lind.* 279. (*g*)

T. 15 *Ja. Topsal* and *Ferrers*. Edward Topsal, clerk, parson of St. Botolph's-without, Aldersgate, London, and the churchwardens of the same, libelled in the ecclesiastical court against Sir John Ferrers, and alleged that there was a custom within the city of London, and especially within that parish, that if any person being man or woman die within that parish, and be carried out of the parish to be buried elsewhere, in such case there ought to be paid to the parson of this parish, if he or she be buried elsewhere, in the chancel so much, and to the churchwardens so much, being the sums that they alleged were by custom payable unto them for such as were buried in their own chancel; and then alleging, that the wife of Sir John Ferrers died within the parish, and was carried away and buried in the chancel of another church, and so demanded of him the said sum. Whereupon for Sir John Ferrers a prohibition was prayed, and upon [269] debate it was granted: for this custom is against reason, that he that is no parishioner, but may pass through the parish, or lie in an inn for that night, should if he then die be forced to be buried

res sacræ, and that money payments for them were therefore acts of simoniacal complexion: but this has not been the way of considering that matter since the Reformation; for the practice goes up at least nearly as far, it appears, founded upon reasonable consideration, and is subjected to the proper controul of an authority of inspection. In populous parishes, where funerals are very frequent, the expence of keeping churchyards in an orderly and seemly condition is not small, and that of purchasing new ones, when the old ones become surcharged, is extremely oppressive. To answer such charges, both certain and contingent, it surely is not unreasonable that the actual use should contribute when it is called for. At the same time, the parishes are not left to carve for themselves in imposing these rates: they are all submitted to the examination of the ordinary, who exercises his judgment, and expresses the result, by a confirmation of their propriety, in terms of very guarded caution. It is perhaps not easy to say where the authority could be more properly lodged or more conveniently exercised. I shall now direct the parish to compose a table of fees for the consideration of the ordinary." 2 *Hagg.* 355, 356.

(*g*) Sir *Simon Degge* says, that the accustomed fee to the parson for breaking the soil in the churchyard is, for the most part, 3*s.* 4*d.*, and for breaking the floor in the chancel, 6*s.* 8*d.* *P.* 146.

there, or to pay as if he were, and so upon the matter to pay twice for his burial. *Hob.* 175. (7)

But Dr. *Gibson* saith, a fee for burial belongs to the minister of the parish in which the party deceased heard divine service, and received sacraments, wheresoever the corpse be buried. And this, he observes, is agreeable to the rule of the canon law, which says, that every one, after the manner of the patriarchs, shall be buried in the sepulchre of his fathers: nevertheless, that if any one desires to be buried elsewhere, the same shall not be hindered, provided that the accustomed fee be paid to the minister of the parish where he died, or at least a third part of what shall be given to the place where he shall be buried. For the understanding of which it is to be noted, that anciently all persons in their wills made a special oblation or bequest to the church at which they were to be interred; and the people in those days depending much upon the prayers of the living for the good of their souls after death, those of better condition coveted oftentimes to be buried in religious houses, with a view to greater assistances which they hoped to receive from the solemn and constant devotions there: also, where the oblations were like to be plentiful, the religious were led by that prospect to desire and promote it. By which means parochial ministers would have been deprived of what belonged of common right to them, and to no other; if the laws which indulged the superstitious conceit of being buried in religious houses had not at the same time provided for the ancient parochial rights; which sometimes was the third, sometimes the fourth part (according to the customs of different places) of what was given to the religious houses: the laws probably presuming that the oblations to those houses would be much larger than what was usually given to the parochial ministers. *Gibs.* 452.

And this was called the canonical portion; and the oblation grew by custom into a fixed right of the parish minister. And hence it is, that in dispensations for burying elsewhere, reservations have been made of the rights of those churches where the parties die. And (to take off the weight in some measure of the
[270] said case of *Topsal* and *Ferrers*) he saith, that this right was not denied, but seemingly acknowledged, by the temporal court in the aforesaid case; where the suit, by the rector and churchwardens of St. Botolph's, Aldersgate, was for the customary fee of burying in the chancel there, because the person died in their parish, and was buried in the chancel elsewhere. For though a prohibition was granted because the custom was unreasonable, yet that unreasonableness (he says) was grounded upon the

(7) For although he were a parishioner, the parson of the parish ought not to have a fee where nothing is done. *Semb. Salk.* 332.

person's being only a stranger, and happening to die in the parish. For so the report itself expresses the ground of the prohibition. "This custom is against reason, that he who is no "parishioner, but may pass through the parish, or lie in an inn "for a night, should be forced to be buried there, or pay as if "he were." Which is in effect a recognition of the right, in case the party deceased hath dwelling in the parish, and is a parishioner. *Gibs.* 452. [But this doth not so well comport with the last words of the recited case, which supposeth it to be unreasonable for a man to pay *twice* for his burial.]

The proportion of fees due for the burial of persons, whether to the incumbent or churchwardens, whether for burying in or out of the parish, depends upon the particular usage and custom of each parish respectively. For as to the incumbent for burying, the foundation of the fee was voluntary, and the obligation or necessity of paying arises from custom, which is the ground of what is before observed out of *Lindwood.* But although the rule of the canon law is, that in case of denial of the customary fee justice is to be done by the ordinary, and though the books of the common law allow this to be in its nature a matter properly of spiritual cognizance; yet it is a very great abatement from that allowance, that the temporal courts reserve to themselves the right of determining, first, Whether there is such a custom, in case that is denied; and, secondly, Whether it is a reasonable custom, in case the custom itself is acknowledged. Upon the first of these heads a prohibition was granted, in the case of *Andrews* and *Symson, M.* 27 *C.* 2., in which two grounds were laid down of granting prohibitions; for defect of jurisdiction, and for defect of trial: and the prohibition granted on this occasion was ranked under the second head, and compared to the case of a *modus decimandi*, which may be demanded in the spiritual court: but if the custom be denied, a prohibition will lie; because the rule of prescription is different in the spiritual court from that in the temporal. And on the like denials we find other prohibitions [271] also granted; as where the church of Westminster, for burying in the abbey, demanded 50*l.*, and the cathedral of York 5*l.* over and above the common fees. Upon the second of these two heads, *viz.* the unreasonableness of the custom, a prohibition was granted in the forementioned case of *Topsal* and *Ferrers,* where the same fees were claimed by the rectors and churchwardens of the parish out of which the corpse was carried, that were usually paid there for the place in which the corpse should be buried elsewhere. But though such demand was reckoned a hardship upon a stranger or traveller who should happen to die there, no fault was found with the rule or proportion of the fee, in case the party deceased had been a fixed parishioner. *Gibs.* 453. 2 *Keb.* 778. 3 *Keb.* 523. 527.

But here it is to be observed, that in the foregoing case of *Andrews* and [illegible], the demand was a fee of four nobles for a parishioner, and of four marks for a stranger; which proportion and difference were not excepted against by the court as unreasonable; but (as hath been said) the prohibition went only because the custom was denied. *Gibs.* 453.

Funeral charges. 10. Funeral expences, according to the degree and quality of the deceased, are to be allowed of the goods of the deceased, before any debt or duty whatsoever. 2 *Inst.* 202. (8)

Stealing shrouds. 11. The carcase that is buried belongeth to no one; but is subject to ecclesiastical cognizance, if abused or removed. 3 *Inst.* 203. (*h*)

And a corpse once buried, cannot be taken up, or removed, without licence from the ordinary. *Gibs.* 454.

That is, to be buried in another place, or the like; but in the

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(8) The deceased should be buried in a manner suitable to the estate he leaves behind him. 2 *Bl. Com.* 508. Executors having assets are accordingly liable for the reasonable expences of the funeral, although they have given no order respecting it. *Tugwell* v. *Heyman and another, executrix, &c.* 3 *Campb.* 298. And *semble*, the judgment should be *de bonis testatoris*. See Mr. *Manning*'s query, in 2*d ed.* of his *Nisi Prius Digest*. But if the executor or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased. 2 *Bl. Com.* 508. In *Shelly*'s case, 1 *Salkeld*, 296. it is said, that in strictness no funeral expences are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and boarer's fees; but not for pall or ornaments. Per lord *Hardwicke*, *Stag* v. *Punter*, 3 *Atk.* 119. "At law, when a person dies indebted, the rule is, that no more shall be allowed for a funeral than is necessary; at first, only 40*s.*, then 5*l.*, at last 10*l.*: but a court of equity is not bound down by such strict rules, especially when a testator leaves great sums in legacies, which is a reasonable ground for an executor to believe an estate is solvent." In the case cited, he allowed 60*l.*, as the testator had directed his corpse should be buried at a church thirty miles distant from the place of his death. In the case of *Offley* v. *Offley*, *Prec. Ch.* 27., 600*l.* had been laid out in Mr. Offley's funeral (whose personal estate was insufficient for payment of his debts), which the court allowed, he being a man of great estate and reputation in his country, and buried there. But this was not against creditors, *comm. semb.*

(*h*) Though, as lord *Coke* says, a corpse is *nullius in bonis*; yet taking up a dead body, though for the purpose of dissection, is an indictable offence at law, as an act highly indecent and *contra bonos mores*. *Lynn*'s case, 2 *Term. Rep.* 733. The 1 *Ja.* 1. *c.* 12. made it felony to steal dead bodies for the purposes of witchcraft, but is repealed by 9 *Geo.* 2. *c.* 5. [as is 28 *El.* *c.* 2., Irish act against witchcraft, by 1 & 2 *G.* 4. *c.* 18.]

case of a violent death, the coroner may take up the body for his inspection, if it is interred before he comes to view it. [illegible] In the Lent assizes holden at Leicester, 11 & 12 [illegible] the case was, one William Haines had digged up the several graves of three men and one woman in the night, and had taken their winding sheets from their bodies, and buried them again; and it was resolved by the justices of Serjeants-inn, in Fleet-street, that the property of the sheets remained the owner's, that is, in him who had the property therein when the dead body was wrapped therewith; for the dead body is not capable of it; and that the taking thereof was felony. 12 *Co.* 113. [272]

Whether a fee is due to the incumbent for erecting a grave stone or monument in the churchyard, hath been questioned by some; and no case hath occurred wherein the same hath received a judicial determination. (9) It seemeth to be an argument in favour of the incumbent, that although it is necessary to bury the dead, yet it is not necessary to erect monuments: and after the soil hath been broken for interring the dead, the grass will grow again, and continue beneficial to the incumbent; but after the erection of a monument, there ceaseth to be any further produce of the soil in that place. And if the incumbent's leave is necessary for the erecting a monument, it seemeth that he may prescribe his own reasonable terms; or if an accustomed fee hath been paid, that such custom ought to be observed. [273] Monuments. [See Church, Div. VIII. 21. p. 372.]

13. By the 3 *J. c.* 5. If any popish recusant, man or woman, not being excommunicate, shall be buried in any place, other than in the church or churchyard, or not according to the ecclesiastical laws of this realm, the executors or administrators of such person buried, knowing the same, or the party that caused him to be so buried, shall forfeit 20*l.*, one-third to the king, one-third to him that shall sue in any of the king's courts of record, and one-third to the poor of the parish where such person died. Popish burial.

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(9) See lord *Stowell's* observation in favour of the common right of a vicar in this case. *Dardin* v. *Calcott*, 1 *Hagg. Rep.* 17.

Calendar. See **Kalendar.**
Calumny (Oath of). See **Oaths.**
Cambridge. See **Colleges.**

Canon.

FOR the office of *canons*, in cathedral or collegiate churches, see **Deans and Chapters.**

Capa.

CAPA, the *cope*, was one of the priest's vestments; so called, as it is said, *a capiendo*, because it containeth or covereth him all over. *Lind.* 252.

Carthusians. See **Monasteries.**

Casula.

CASULA, the *chesible*, was a garment worn by the priest, next under the cope; and is said to have been so called, as being a kind of *cottage* (as it were) or little house, covering him. *Lind.* 252.

Catechism.

1. BY *Can.* 59. Every parson, vicar, or curate, upon every Sunday and holiday, before evening prayer, shall, for
[275] half an hour or more, examine and instruct the youth and ignorant persons of his parish in the ten commandments, the articles of the belief, and in the Lord's prayer; and shall diligently hear, instruct, and teach them the catechism set forth in the book of common prayer. And all fathers, mothers, masters, and mistresses, shall cause their children, servants, and apprentices, which have not learned the catechism, to come to the church at the time appointed, obediently to hear, and to be ordered by the

minister until they have learned the same. And if any minister neglect his duty herein, let him be sharply reproved upon the first complaint, and true notice thereof given to the bishop or ordinary of the place. If, after submitting himself, he shall willingly offend therein again, let him be suspended. If so the third time, there being little hope that he will be therein reformed, then excommunicated, and so remain until he be reformed. And likewise if any of the said fathers, mothers, masters, or mistresses, children, servants, or apprentices, shall neglect their duties, as the one sort in not causing them to come, and the other in refusing to learn, as aforesaid, let them be suspended by their ordinaries (if they be not children), and if they so persist by the space of a month, then let them be excommunicated.

2. And by the *rubric:* The curate of every parish shall diligently, upon Sundays and holidays, after the second lesson at evening prayer, openly in the church instruct and examine so many children of his parish sent unto him as he shall think convenient, in some part of the catechism.

And all fathers and mothers, masters and dames, shall cause their children, servants and apprentices (which have not learned their catechism), to come to the church at the time appointed, and obediently to hear, and be ordered by the curate, until such time as they have learned all that therein is appointed for them to learn.

3. That part of the church catechism which treats of the sacraments is not in the 2d nor 6th of *Ed.* 6., but was added in the beginning of the reign of king *James* the first, upon the conference at Hampton court. *Gibs.* 375.

4. In the office of public baptism, the minister directeth the godfathers and godmothers to take care that the child be brought to the bishop to be confirmed by him, so soon as he or she can say the creed, the Lord's prayer, and the ten commandments in the vulgar tongue, and be further instructed in the church catechism set forth for that purpose.

Cathedrals. [276]

1. AFTER the conversion of Constantine the emperor, the other converts in those days, and in the following times, who were many of them governors and nobles, settled great and large demesne lands on those who converted them, and the first oratories or places of public worship are said to have been built upon those lands; which first oratories were called *cathedræ*, Origin of cathedrals.

sedes; cathedrals, or seats; from the clergy's constant residence thereon. *God.* 347. (10)

Difference between cathedral, conventual, and collegiate churches.

2. The distinction between *cathedral, conventual,* and *collegiate* churches, perhaps may be best understood from the description given by *Lindwood* of the several names. Properly speaking, says he, a *chapter* is spoken in respect of a cathedral church; a *convent*, in respect of a church of regulars; a *college*, in respect of an inferior church, where there are *collected* together persons living in common. *Gibs.* 172.

Cathedral churches to be in cities.

3. The *sees of bishops ought regularly to be fixed in such towns only as are noted and populous.* When this was made a rule of the church by a canon of the council of Sardica, the only design seems to have been, to prevent the needless multiplication of bishops' sees; inasmuch as that canon, describing such a small city as within which a bishop's see should not be established, calls it such a one as a single presbyter might be sufficient for, in point of numbers. But it was afterwards understood by the canon law, that of what extent, or how populous soever, the diocese or jurisdiction of a bishop might be, it was most agreeable to the episcopal dignity to place the see or cathedral church in some large and considerable town. Pursuant to which, with express reference to the aforesaid council, and to the decrees of pope Leo and pope Damasus, it was decreed in a council under archbishop Lanfrank, that certain episcopal sees which before had been in small towns and villages, should be settled in the most noted places; and several were accordingly removed, as Dorchester to Lincoln, Selsea to Chichester, Kirton to Exeter: which rule was also observed in fixing the sees of the five new bishoprics erected by king Henry the eighth. *Gibs.* 171.

And every town which hath a see of a bishop placed in it, is thereby entitled to the honour of a city. *Gibs.* 171.

[277] And lord *Coke* defineth a city thus: A city (saith he) is a borough incorporate which hath, or hath had, a bishop; and though the bishopric be dissolved, yet the city remaineth. 1 *Inst.* 109.

But this extendeth not to the cathedral churches in Wales, divers of which are established in small villages.

Certain forfeitures for the repair of cathedrals.

4. Besides the proper revenues of cathedral churches, to be applied towards the repair thereof, there are divers forfeitures by several canons of archbishop Stratford, to be disposed of to the same purpose; to wit, for the unfaithful execution of wills; for extorting undue fees for the probate of wills; for undue commu-

(10) The cathedral is the see of the bishop, and cannot be conveyed to another without him. *Dean and Chapter of Norwich's case,* 2 *And.* 168. The king by his patent may create a church *et ambitum ecclesiæ*, a cathedral. *Hayward* v. *Fulcher, Jones,* 166.

tation of penance; and half the forfeitures for excessive fees at the admission of a curate.

5. Every see or cathedral (as such) is exempt from archidiaconal jurisdiction. Thus a bishop's see, having been newly erected within the limits of a certain archdeaconry, it was represented that the archdeacon had presumed to exercise his jurisdiction over the bishop there consecrated, and the church: and Gregory the ninth decreed thereupon, that this should no more be done, but that the bishop should be exempt from the archidiaconal jurisdiction; which decretal epistle became part of the body of the canon law. *Gibs.* 171. (*i*)

Cathedral exempt from the archdeacon's jurisdiction.

6. For the freedom of elections in general, it was thus provided by the statute of the 3 *Ed.* 1. *c.* 5. *Because elections ought to be free, the king commandeth, upon great forfeiture, that no man by force of arms, nor by malice, or menacing, shall disturb any to make free election.*

Elections in cathedrals

Which statute, being general, did evidently include ecclesiastical elections as well as others: but some doubt having probably been made whether they were included, it was judged advisable to move the king for a special declaration to that purpose, in the *articuli cleri*, 9 *Ed.* 2. *c.* 14. If any dignity be vacant, where election is to be made, it is moved that the electors may freely make their election, without fear of any temporal power, and all prayers and oppressions shall in his behalf cease. *The answer:* they shall be made free according to the form of statutes and ordinances; that is, according to the said statute of the 3 *Ed.* 1. *c.* 5., which also was but declaratory of the common law. 2 *Inst.* 169. 632. *Gibs.* 175.

And by the 31 *Eliz. c.* 6. It is thus enacted: Whereas by the intent of the founders of cathedral and collegiate churches, and [278] by the statutes and good orders of the same, the elections, presentations, and nominations of officers and other persons to have room or place in the same, are to be had and made of the fittest and most meet persons, being capable of the same elections, presentations and nominations, freely, without any reward, gift, or thing given or taken for the same; and for the true performance whereof, some electors, presentors and nominators in the same have or should take a corporal oath to make their elections, presentations and nominations accordingly; yet, notwithstanding, it is found by experience, that the said elections, presentations and nominations be many times wrought and brought to pass with money, gifts and rewards, whereby the fittest persons to be elected, presented or nominated, wanting money or friends, are seldom or not at all preferred, contrary to the good meaning of the said founders, and the said good statutes and ordinances,

(*i*) X. 1. 33. 16.

and to the great prejudice of learning, and the commonwealth and estate of the realm: For remedy whereof it is enacted, that if any person or persons, or bodies politic or corporate, which have election, presentation or nomination, or voice or assent in the choice, election, presentation or nomination of any person to have room or place in any of the said cathedral or collegiate churches, shall have, receive or take, or shall accept any promise, agreement, covenant, bond or other assurance to receive or have any money, fee, reward or any other profit, directly or indirectly, either to himself or themselves, or to any other of his or their friends, for his or their voice or assent, in such election, presentation or nomination as aforesaid; then and from thenceforth the place, room or office which such person so offending shall then have in any of the said churches shall be void, and the same may be disposed of in such manner as if such person so offending were naturally dead. § 1, 2. (k)

And if any officer of any of the said churches, or other person having room or place in the same, shall directly or indirectly take or receive, or by any way, device or means, contract or agree to have or receive any money, reward or profit whatsoever, for
[279] the leaving or resigning up of the same his room or place, for any other to be placed in the same; every person so taking or contracting shall forfeit double the sum of money, or value of the thing so received or agreed to be received or taken; and every person by whom or for whom any money, gift or reward as aforesaid shall be given or agreed to be paid, shall be uncapable of that place or room for that time or turn, and shall not be had nor taken to be a lawful officer, or to have such room or place there, but they to whom it shall appertain shall appoint another as if such person were dead or had resigned. § 3.

And for the more sincere election, presentation and nomination of officers and other persons to have room or place in any of the said churches; at the time of every such election, presentation or nomination, as well this present act, as the orders and statutes of such place concerning such election, presentation or nomination to be had, shall then and there be publicly read; upon pain that every person in whom default thereof shall be, shall forfeit 40*l*. § 4.

(*k*) On the subject of bribery it has been decided, that if a voter take a bribe, it is immaterial whether he perform his promise, or break it by voting for the opposite party. 3 *Bur.* 1235. *Sulston and Norton, and Bush and Rawlins, there cited.* Also, that bribery is a crime indictable at common law, independently of acts of parliament. 3 *Bur.* 1335. But that an action of debt to recover a penalty on the 2 *Geo. c.* 24. for bribery at elections, is a civil suit, and therefore that in such action a *quaker* may give evidence on affirmation. *Atcheson and Everitt, Cowp.* 382.

All which forfeitures shall be, half to him or them that will sue for the same in any of the queen's courts of record, and half to the use of such cathedral or collegiate church where such offence shall be committed. § 4.

As to the methods of proceeding in elections they depend in a great measure upon the local statutes and customs of each cathedral and collegiate body, and therefore cannot be brought under the rules which the antient canon law hath laid down. Nevertheless, it may be of use, in cases which the statutes have left doubtful, or not clearly determined, to set down here some rules relating to elections, which lie dispersed in the body of the canon law. (*l*) As,

(1.) Concerning the *time* for election; this the canon law determines that it shall not exceed the space of three months from the vacancy, and if it be deferred longer (without lawful impediment) the electors shall for that turn lose their right of election, and the same shall devolve upon those who have the next right, who also shall fill up the vacancy within other three months, on pain of canonical censures. (*m*) And after the elec-* [280] tion they shall notify the same to the person elected, so soon as they reasonably can; who shall assent thereunto within the space of one month, and within three months afterwards shall procure confirmation thereof, otherwise the election (if there be no lawful impediment intervening) shall be void. (*n*) —— But the election, or any citation or process relating thereto, ought not to be before the interment of the deceased. (*o*)

(2.) Concerning the manner of proceeding to the election, it is ordained, that when canons or prebendaries are wanted, or benefices to be disposed of, the canons absent are to be *cited*, if conveniently it may be, unless there be a custom to the contrary; otherwise what is done in their absence shall be of no effect. (*p*)

(*l*) Elections are said by the canon law to be made in three ways; *per inspirationem*, when all the electors, as if by inspiration, agree in the choice of one person: *per scrutinium*, when three scrutineers are appointed to take the votes; and *per compromissum*, when certain fit persons are deputed, to whom the power of electing is transferred. *Inst.* J. C. 1. 6.

(*m*) X. 1. 6. 41. *De electione et electi potestate.*

(*n*) X. 1. 6. 6.

(*o*) *Ib.* 1. 6. 36.

(*p*) 6° 3, 4. 33. *Sæpe enim rescriptum est, magis hac in re unius obesse contemptum quam multorum contradictionem. Inst.* J. C. 1. 6. So an election of a vicar by trustees was declared void for want of *notice* of the meeting; for, per lord *Hardwicke*, " It is so in all corporate bodies; whether the election be by the corporation at large, or by a select number, notice is required, unless the election is to be

(3.) And no person shall constitute a *proxy* in the business of election, unless he be absent in a place from whence he ought to be cited (and not in a foreign country, or the like), and hindered by just impediment from attending, of which he shall cause proof to be made upon oath if required. In such case, if he will, he may constitute one of the chapter or collegiate body to be his proxy. (*q*)

But if none of the chapter will be his proxy, he cannot depute any other without consent of the chapter, nor give his vote by letter, which ought not to be given before the meeting for the election, but only at that time. (*r*)

And if one of the chapter be constituted proxy generally, if he nominate one person upon his own account, and another in the name of his constituent, it shall pass for nothing; but if he
[281] hath a special proxy, to choose such a person by name, then he may lawfully consent to the election of one in his own name, and to the election of another in the name of his constituent. (*s*)

(4.) When the election is to be made, and all are present who ought, and will, and can conveniently attend; three of the society shall take the *votes* of every one, secretly and severally, and put the same in writing, and then immediately publish the

on the charter, or a particular day, in which case every body is obliged to take notice of it." *Wilson* v. *Dennison, Amb.* 82. And this being a personal trust, to be exercised according to the discretion of the trustees, they were not allowed to vote by proxies, [and must all join, or the bishop may refuse their nominee; nor can he be compelled by *quare impedit* to institute him. *Ib.*, and *Atto. Gen.* v. *Scott,* 1 *Ves.* 415. A decree, ordering the trustees to elect within four months, is directory only, and satisfied if they elect within six months. So, though the decree require the keeping up an assistant preacher, that after long disuse may be dispensed with, by consent of the trustees and the parish. *Wilson* v. *Dennison.* But if trustees have been appointed by a decree to elect and present a minister, the right of election shall not again devolve to the parish at large; popular election being the worst way of nominating, and what all courts should if possible avoid. Thus, if some only of the trustees are dead, the court of chancery will fix a meeting to fill up their places; if all are dead, new ones will be appointed. *Atto. Gen.* v. *Scott.* Where the trust of an advowson is to present some fit person, such as the inhabitants and parishioners, or the majority of the chiefest and discreetest of them, should nominate, the right of election is in the inhabitants above the age of twenty-one, paying the church and poor rates; and a popular election by a majority of such voters, and others not so qualified, was established in *Fearon* v. *Webb,* 14 *Ves.* 13.]

(*q*) X. 1. 6. 42. *Davis, Rep.* 47 *b.*

(*r*) 6° 1. 6. 46. (*s*) *Ibid.*

same amongst them all; and on casting up the votes, he shall be elected, who has the majority of legal votes. (*t*)

And they cannot vary after the votes are published; for then they ought to proceed to cast up the votes, and declare the election. (*u*)

(5.) By the *majority* is meant, the majority of the whole number of electors; therefore if there are seven electors, and two of them chuse one person, and two another, and three another, he who has the three votes shall not be duly elected, as not being chosen by a majority of the electors. (*x*)

(6.) By the majority of *legal* votes (the *major et sanior pars*) are excluded those who are admitted upon protestation, that their votes shall not be good, if it shall appear that they have not a legal right to vote, and it shall afterwards be made appear, [282] upon appeal or otherwise, that they have no legal right. Now persons may be disqualified several ways: as by custom; or by their own crime, where they have committed any offence which renders them incapable. So persons under suspension, or under the greater excommunication, can neither be electors, nor be themselves elected. (*y*)

But if a member be in possession, although not of right, he may be an elector, and such election is valid, provided he be in quiet possession, because he believeth that he hath right (*z*). But if

(*t*) X. 1. 6. 42. It is a corollary to this rule, that the consent of the electors must be given "*simul et semel,*" or "*in one place and at one time.*" *Davis, Rep.* 48.

(*u*) X. 1. 6. 58.

(*x*) A similar case is decided in the *Decretal* of *Gregory*, 1. 6. 50. If certain persons who voted under protest had a right to vote: there were 55 electors; but 23 only voted for one candidate, and 22 for the other. If those persons were excluded, 21 had a right to vote; but the numbers in that case were only 10 and 8, and the election was declared void: because, according to another text, *licet majorem partem facerent partium comparatione minorum, non tamen ad majorem partem capituli pervenerunt. Ib.* 1. 6. 48. But an exception to this rule took place, if he who had the majority of voices was ineligible from his order, age, or learning, and his ineligibility was notorious or made known to the electors; for then his election was to be set aside, and he who had the fewest voices confirmed. *Ib. c.* 22. Where an integral part of a corporation, composed of a definite number, is required to vote at an election, a majority of such integral definite part must attend. *Rex* v. *Bellringer*, 4 *T. Rep.* 810. *Rex* v. *Miller*, 6 *T. Rep.* 268. But a charter, and, in the absence of a charter, prescription, which is evidence of a charter, may by our law give the right of election to the majority of those present of a definite number, although the number present should not constitute a majority of the full corporation. *Rex* v. *Hoyte*, 6 *T. Rep.* 430.

(*y*) *Inst.* J. C. 1. 7.

(*z*) X. 1. 6. 24.

from the first, before the election is made, it shall be denied that he hath such right, and he is admitted under protestation, that his voice shall be valid if indeed it ought to be valid, and that it shall not be valid unless it shall appear that he hath such right; in such case his possession shall not avail.

(7) Where the votes are *equal*, one who is an elector being chosen, shall have the preference before one who is not an elector: As, for instance, if there are seven voters, and three of them choose one of the seven, and other three choose another who is not of the seven; he of the seven who is chosen shall have the preference, provided he himself consent and agree to his election, and there be no canonical impediment. (*a*)

(8) If the lesser number of the electors proceed *precipitately* to make election before the rest who ought to be present are come in, such election is void, although the major part of the whole number should assent to it afterwards. But if after such undue election made and divers of the electors are gone home, they who remain shall proceed to another election, such other election is also void; for they ought to appeal. (*b*)

(9) A *pre-election* into a place not vacant, is void. And so it was declared in the court of King's Bench. *E.* 34. *C.* 2. in the case of *Stainhoe* and *Owen:* Dr. Owen was elected prebendary in the church of St. David's, where such elections had been usual, when all the prebends were full; but upon a vacancy Dr. Stainhoe was admitted, and the court would not grant a mandamus to admit Dr. Owen, because (as is there said) it was a ridiculous
[283] custom to elect where no prebend was vacant, for that there cannot be an election but into a void place. (2 *T. Jones*, 199.) [a]

(*a*) X. 1. 6. 33. The dean has no casting voice where the numbers are equal. See Deans and Chapters, IV. 10. 5. and Hospitals, 4.
(*b*) *Ib.* 1. 6. 29.

[a] This case seems to be somewhat misreported. The prebends at St. David's are in the gift of the bishop, and therefore the election could not be to a prebend. But there are in that church six *residentiariships;* and to one of these it seemeth the pre-election was made. Three of the residentiaries are named by the bishop, *viz.* the chantor, chancellor, and treasurer. The other three are elective out of the body of the prebendaries. The custom had prevailed for some time, for the six to agree to elect a seventh supernumerary; who should, in return of the obligation, keep residence, and do the business of his electors, and should succeed to the next vacancy in the chapter by election. It seemeth from the above-mentioned report, that Dr. Owen having been thus pre-elected, was refused to be admitted: upon which he moved for a mandamus; but the court would not grant the same, such pre-election being merely void. This custom of St. David's, after some endeavours to be continued hath now (it is said) entirely ceased.

It is true, there *may* be a pre-election; and, upon a death, the person *may* afterwards be admitted: but such pre-election binds not the body, so as that they may not elect any other when the vacancy happens; especially, where the electors are the patrons, and are also the persons to admit. The caution given in this case by the canon law is, not to choose to the place which shall be next vacant; but if they choose a man to be a brother or a fellow of the society, and promise to confer upon him the next vacant benefice, such election is good. *Gibs.* 176, 7, 8. (*c*)

7. Where the dean or other chief governor of any cathedral or collegiate church hath a certain portion of the possessions alone limited to his office; and every prebendary, vicar, petty canon, and other minister spiritual hath another alone and distinctly limited to his respective office: they shall be rated for their first fruits separately and not jointly. 26 *H.* 8. *c.* 3. § 25.

How the first fruits of the revenues thereof shall be charged.

8. The cathedral church is the parish church of the whole diocese (which diocese was therefore commonly called *parochia* in antient times, till the application of this name to the lesser branches into which it was divided made it for distinction's sake to be called only by the name of diocese): and it hath been affirmed, with great probability, that if one resort to the cathedral church to hear divine service, it is a resorting to the parish church, within the natural sense and meaning of the statute. *Gibs.* 171. [284]

Cathedral the parish church of the whole diocese.

Upon which account it is ordained by a canon of Simon Mepham, archbishop of Canterbury, that, in certain cases, they who cannot be cited personally, nor in their dwelling house, may be cited in their parish church; and if they have no parish church, or that doth not appear, then they shall be cited in the cathedral. *Gibs.* 1003.

And by *Can.* 65. Excommunicates shall be denounced every six months, as well in the parish church, as in the cathedral church of the diocese.

9. In honour of the cathedral church, and in token of subjection to it, as the bishop's see; every parochial minister within the diocese pays to the bishop an annual pension, called antiently *cathedraticum*. This acknowledgment is supposed to have taken rise from the establishment of distinct parishes, with certain revenues, and thereby the separating of those districts from the immediate relation they had borne to the cathedral church. By a canon of the council of Bracara, this pension is called *honor cathedræ episcopalis*, and restrained (if it was not limited before) to two shillings each church: which canon became afterwards part of the canon law of the church, with this gloss upon the words *two shillings* (viz. *at most; for sometimes less is given*); and hath been received in England, as in other churches, under the

Acknowledgment paid thereunto upon that account.

(*c*) X. 3. 5. 19.

name of *synodaticum*, or *synodals*, because generally paid at the bishop's synod at Easter. *Gibs.* 171.

Bishop's residence there. (1)

10. *Langton.* Bishops shall be at their cathedrals, on some of the greater feasts, and at least in some part of lent. *Lind.* 130.

Otho. Bishops shall reside at their cathedral churches, and officiate there on the chief festivals, on the Lord's days, and in lent, and in advent. *Athon.* 55.

Othobon. Bishops shall be personally resident to take care of their flock, and for the comfort of the churches espoused to them; especially on solemn days, in lent and advent: unless their absence be required by their superiors, or for other just cause. *Athon.* 118.

Dean and chapter's residence there. (2)

11. *Can.* 42. Every dean, master, or warden or chief governor of any cathedral or collegiate church, shall be resident there fourscore and ten days, *conjunctim* or *divisim*, in every year at the least, and then shall continue there in preaching the word of God, and keeping good hospitality; except he shall be otherwise let with weighty and urgent causes to be approved by the bishop,
[285] or in any other lawful sort dispensed with. And when he is resident, he with the rest of the canons or prebendaries resident, shall take special care, that the statutes and laudable customs of their church (not being contrary to the word of God or prerogative royal), the statutes of this realm being in force concerning ecclesiastical order, and all other constitutions now set forth and confirmed by his majesty's authority, and such as shall be lawfully enjoined by the bishop of the diocese in his visitation, according to the statutes and customs of the same church or the ecclesiastical laws of this realm, be diligently observed; and that the petty canons, vicars choral, and other ministers of their church, be urged to the study of the holy scriptures; and every one of them to have the new testament, not only in English, but also in Latin.

Can. 44. Prebendaries at large, shall not be absent from their cures above a month in the year; and residentiaries shall divide the year among them, and when their residence is over, shall repair to their benefices.

Administration of the holy communion there.

12. *Can.* 24. In all cathedral and collegiate churches, the holy communion shall be administered upon principal feast days, sometimes by the bishop (if he be present), and sometimes by the dean, and at sometimes by a canon or prebendary: the principal minister using a decent cope, and being assisted with the gospeller and epistler agreeably according to the advertisements published in the seventh year of queen Elizabeth (hereafter following.) The said communion to be administered at such

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(1) Now regulated by statute 57 *G.* 3. *c.* 99. § 82. *infra*, Residence.
(2) Now regulated by statute 57 *G.* 3. *c.* 99. § 10—13. *infra*, Residence.

times, and with such limitation, as is specified in the book of common prayer. Provided that no such limitation by any construction shall be allowed of, but that all deans, wardens, masters, or heads of cathedral and collegiate churches, prebendaries, canons, vicars, petty canons, singing men, and all others of the foundation, shall receive the communion four times yearly at the least.

13. *Can.* 43. The dean, master, warden or chief governor, prebendaries and canons in every cathedral and collegiate church, shall preach there in their own persons, so often as they are bound by law, statute, ordinance, or custom; and if they be sick, or lawfully absent, they shall substitute such licensed preachers to supply their turns, as by the bishop shall be thought meet to preach in cathedral churches. And if any otherwise neglect or omit to supply his course, the offender shall be punished by the bishop, or by him or them to whom the jurisdiction of that church appertaineth, according to the quality of the offence. Preaching.

And by *Can.* 51. The deans, presidents, and residentiaries of any cathedral or collegiate church shall suffer no stranger to preach unto the people in their churches, except they be allowed by the archbishop of the province, or by the bishop of the same diocese, or by either of the universities. And if any in his sermon shall publish any doctrine, either strange, or disagreeing from the word of God, or from any of the thirty-nine articles, or from the book of common prayer; the dean or the residents shall by their letters, subscribed with some of their hands that heard him, so soon as may be, give notice of the same to the bishop of the diocese, that he may determine the matter, and take such order therein as he shall think convenient. [286]

14. By the 13 & 14 *C.*2. *c.* 4. § 20. A lecturer being chosen in a cathedral or collegiate church, need not to read the common prayer, as other persons admitted to ecclesiastical offices; but it shall be sufficient openly to declare his assent and consent to all things therein contained. Lecturers. [See Lecturer.]

15. The advertisements published in the seventh year of queen Elizabeth, and referred to in *Can.* 24. aforegoing, are as follows: Item, In the ministration of the holy communion in cathedral and collegiate churches, the principal minister shall use a cope, with gospeller and epistler agreeably; and at all other prayers to be said at the communion table, to use no copes but surplices. Item, That the dean and prebendaries wear a surplice, with a silk hood, in the quire; and when they preach in the cathedral or collegiate church, to wear a hood. Habits to be worn there.

And at the end of the service book in the second year of Edward the sixth, it is ordered, that in all cathedral churches, the archdeacons, deans, and prebendaries, being graduates, may use in the quire, besides their surplices, such hoods as pertaineth to their several degrees, which they have taken in any university within this realm.

Visitation thereof.

16. Churches *collegiate* and *conventual* were always visitable by the bishop of the diocese: if no special exemption was made by the founder thereof. *Hughes*, c. 28.

And the visitation of *cathedral* churches doth belong unto the metropolitan of the province; and to the king, when the archbishopric is vacant. *Id.*

Ornaments to go to the successor.

17. The see of a bishop is entitled to the ornaments of the chapel at his death. This was declared in the bishop of Carlisle's case, 21 *Ed.* 3. and is pleaded by lord *Coke* in the case of
[287]
Corvin and *Pym*, as good law; that although other chattels belong to the executors of the deceased, and shall not go in succession, yet the ornaments of a chapel of a preceding bishop are merely in succession. *Gibs.* 171.

Cathedrals of the new foundation.

18. Concerning the cathedral churches of the new foundation, it is enacted by the 31 *H.* 8. *c.* 9., *that* the king shall have power to declare and nominate by letters patents or other writing under the great seal, such number of bishops, such number of cities (sees for bishops), cathedral churches, and dioceses, by metes and bounds, as shall appertain; and (*out of the revenues of the dissolved monasteries*) to endow them, with such possessions, after such manner and condition, as he shall think necessary and convenient.

And it appears by a scheme for new cathedrals and bishoprics, under the hand of king Hen. 8. that his design was, to erect many more (pursuant to the powers given by this act) than were erected. 1 *Burnet*, 262.

By the charters of foundation of the new cathedral and collegiate churches erected by the said king, it is ordered, that they should be ruled and governed by statutes to be specified in certain *indentures* then after to be made by him: which statutes were accordingly made and delivered to the said churches, but not indented. Whereupon the act of the 1 *Mar. sess.* 3. *c.* 9., asserting the said statutes to be therefore void, gave power to the said queen to ordain such statutes and ordinances for the same, as should seem good unto her; but she died before much was done. Afterwards the same power was given to queen Elizabeth, by the 1 *El. c.* 22. during her life: who gave power to the ecclesiastical commissioners to prepare new statutes for the same, which accordingly were prepared and finished in the month of July 1572, ready for the royal confirmation, but this (for what reason, or by what accident, appears not) was never obtained, *Gibs.* 181.

But by the 6 *An. c.* 21. in order to settle the disputes which had arisen concerning the validity of such statutes, it is enacted, *That* in all cathedral and collegiate churches founded by king Henry the eighth, such statutes as have been usually received and practised in the government of the same respectively since the restoration of king Charles the second, and to the observance whereof the deans and prebendaries and other members of the

said churches from the said time have used to be sworn at their instalments or admissions, shall be good and valid, and be taken and adjudged to be the statutes of the said churches respectively: nevertheless, so far forth only as the same or any of them are in no manner repugnant to or inconsistent with the constitution of the church of England as the same is now by law established, or the laws of the land. Which act, together with the cases that have happened thereupon, falleth in more properly under the title **Deans and Chapters.** [288]

Cathedraticum.

CATHEDRATICUM hath been treated of under the title next aforegoing.

Caveat.

A Caveat is a caution entered in the spiritual court, to stop probates, administrations, licences, dispensations, faculties, institutions, and such like, from being granted without the knowledge of the party that enters it. See 1 *Vernon*, 119.

And a caveat is of such validity by the *canon* law, that if an institution, administration, or the like, be granted, pending such caveat, the same is void. *Ayl. Par.* 145, 6. 1 *Lev.* 157. *Owen.* 50.

But not so by the *common* law. For by the common law, an admission, institution, *probate* (*d*), administration, or the like, contrary to a caveat entered, shall stand good; in the eye of which law, the caveat is said to be only a caution for the information of the court (like a caveat entered in chancery against the passing of a patent, or in the common pleas against the levying of a fine); but that it doth not preserve the right untouched so as to null all subsequent proceedings, because it doth not come from any superior; nor hath it ever been determined, that a bishop became a disturber, by giving institution without regard to a caveat; on the contrary, it was said by *Coke* and *Doderidge*, in the case of *Hutchins* and *Glover*, *H.* 14 *Ja.*, that they have nothing to do with a caveat in the common law. *Gibs.* 778. 2 *Bac. Abr.* 404. *Ayl. Par.* 145, 6.

[**Cessavit.** See **Glebe Lands**, 40.] [289]
Cession. See **Avoidance.**
Chancel. See **Church.**

(*d*) As to probates, vide 2 *Stra.* 857. 956.

Chancellors, &c.

Chancellor. (4)

1. THE word *chancellor* is not mentioned in the commission, and but rarely in our antient records: but seemeth to have grown into use in imitation of the like title in the state; inasmuch as the proper office of a chancellor as such, was, to be keeper of the seals of the archbishop or bishop, as appears from divers entries in the registry of the archbishops of Canterbury. *Gibs.* 986.

Official principal and vicar general. [See Archdeacon.]

2. This office (as it is now understood) includeth in it two other offices, which are distinguished in the commission by the titles of *official principal* and *vicar-general*. The proper work of an *official* is, to hear causes between party and party, concerning wills, legacies, marriages, and the like, which are matters of temporal cognizance, but have been granted to the ecclesiastical courts by the concessions of princes. The proper work of a *vicar-general* is, the exercise and administration of jurisdiction purely spiritual, by the authority and under the direction of the bishop, as visitation, correction of manners, granting institutions, and the like, with a general inspection of men and things, in order to the preserving of discipline and good government in the church. *Gibs. Introd.* 22. *Gibson's Tracts*, 108.

And although these two offices have been ordinarily granted together; yet we find in the acts and records of the several sees frequent appointments of vicars-general separately, upon occasional absences of the archbishops or bishops. *Gibson's Tracts*, 110.

For the vicar-general was an officer occasionally constituted, when the bishop was called out of the diocese, by foreign embassies, or attendances in parliament, or other affairs, whether public or private; and being the representative of the bishop for that time, his commission contained in it all that power and jurisdiction which still rested in the bishop notwithstanding the appointment of an official, that is the whole administration
[290] except the hearing of causes in the consistory court. *Gibs. Introd.* 23.

And Dr. *Gibson* takes occasion to wish, that theseoffices might be kept separate still; the office of *vicar-general* to be vested in the hands of some grave and prudent clergyman, usually resident within the diocese; and that of *official* (as being conversant about temporal matters) in the hands of a layman, well skilled in the civil law. *Gibs.* 990.

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(4) The bishop's chancellor is appointed to hold the bishop's courts for him, and to assist him in matters of ecclesiastical laws; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some university. 1 *Bl. Com.* 382. 37 *H.* 8. *c.* 17.

3. Commissary is he that is limited by the bishop to some certain place of the diocese, to assist him; and in most cases hath the authority of official principal and vicar-general within his limits. *Terms of the law*, tit. *Commissary*. 4 *Inst.* 338. Commissary.

The chancellor is not confined to any place of the diocese, nor limited to some certain causes only of jurisdiction; but every where throughout the whole diocese he supplieth the bishop's absence, in all matters and causes ecclesiastical within his diocese. But the authority of commissaries, as it is restrained to some certain place of the diocese, so is it also restrained to some certain causes of jurisdiction, limited unto them by the bishops: for which reason the law calls them *officiales foranei*, as restrained *cuidam foro* only of the diocese. *God.* 81.

4. And what is said of commissaries may be also applied to the officials of such archdeacons as have a concurrent jurisdiction with their bishop. *Gibs. Tract.* 114. Archdeacon's official.

5. By *Can.* 127. No man shall be admitted a chancellor, commissary, or official, to exercise any ecclesiastical jurisdiction, except he be of the full age of six and twenty years at the least, and one that is learned in the civil and ecclesiastical laws, and is at the least a master of arts, or bachelor of law, and is reasonably well practised in the course thereof, as likewise well affected and zealously bent to religion, touching whose life and manners no evil example is had, and except before he enter into or execute any such office, he shall take the oath of the king's supremacy in the presence of the bishop, or in the open court, and shall subscribe to the thirty-nine articles, and shall also swear that he will to the uttermost of his understanding deal uprightly and justly in his office, without respect of favour or reward; the said oaths and subscription to be recorded by a register then present. Qualification.

And they are also to take the oaths at the sessions, as other persons qualifying for offices.

In the second year of king Charles the first, Dr. Sutton, chancellor of Gloucester, was sued before the high commissioners, for that he being a divine, and having never been brought up in the science of the civil or canon laws, nor having any understanding therein, took upon him the office of chancellor, contrary to the canons and constitutions of the church. Whereupon he prayed a prohibition of the common pleas, suggesting that he had a freehold in the chancellorship, and ought to enjoy the same for life: but the court would not grant the prohibition; because it belongeth to the spiritual courts to examine the abilities of spiritual officers; and so, though a lay person gains a freehold by his admission to a benefice, yet he may be sued in the spiritual court, and deprived for that cause. *Gibs.* 987. [291]

But of later days, when Dr. Jones, chancellor of Landaff,

was libelled against for ignorance, prohibition was prayed, and also obtained upon this foot of freehold; and when consultation was prayed, as in a case of mere ecclesiastical cognizance, and the prayer was supported by the precedent of Dr. Sutton, the court inclined against it, and denied Sutton's case to be law. *Gibs.* 987. 4 *Mod.* 31. (*e*)

Jurisdiction.

6. Concerning the nature and extent of the power of chancellors, as that name is understood at present, bishop *Stillingfleet* saith as follows:

There is a difference in law and reason, between an ordinary power depending on an ancient prescription and composition, (as it is in several places in the deans and chapters within their precincts), and an ordinary power in a substitute, as a chancellor or vicar-general. For although such an officer hath the same court with the bishop, so that the legal acts of court are the bishop's acts by whose authority he sits there, so that no appeal lies from the bishop's officer to the bishop himself, but to the superior; and although a commissary be allowed to have the power of the ordinary in testamentary causes, which were not originally of ecclesiastical jurisdiction: yet in acts which are of spiritual and voluntary jurisdiction, the case is otherwise. For [292] the bishop, by appointing a chancellor, doth not divest himself of his own ordinary power; but he may delegate some parts of it by commission to others, which goes no farther than is expressed in it. For it is a very great mistake in any to think, that such who act by a delegated power, can have any more power than is given to them, where a special commission is required for the exercise of it. For by the general commission no other authority passeth, but that of hearing causes: but all acts of voluntary jurisdiction require a special commission, which the bishop may restrain as he sees cause. For, as *Lindwood* saith, nothing passes by virtue of the office but the hearing of causes: so that other acts depend upon the bishop's particular grant for that purpose. And the law no where determines the bounds of a chancellor's power as to such acts; nor can it be supposed so to do, since it is but a delegated power, and it is in the right of him that deputes to circumscribe and limit it. Neither can use or custom enlarge such a power, which depends upon another's will. And however by modern practice the patents for such places have passed for the life of the person to whom they were first granted; yet it was not so by the ancient ecclesiastical law of England. For *Lindwood* affirms, that a grant of jurisdiction ceaseth by the death of him who gave it;

(*e*) By a constitution of *Otho*, judges ignorant of the law, in a doubtful case, from which a prejudice may arise to either party, may, at the expence of both parties, call in the counsel of a learned assessor. *Ath.* 72.

or otherwise it could never pass into the dean and chapter *sede vacante*, or to the guardian of the spiritualties. And he gives a good reason for it, that the bishop may not have an official against his will, perhaps disagreeable to him. It is true, that by the statute of the 37 *H.* 8. *c.* 17. mere doctors of laws are made capable of exercising all manner of ecclesiastical jurisdiction; but it doth not assign the extent of their jurisdiction, but leaves it to the bishops themselves, from whom their authority is derived. And the law still distinguisheth between ordinary and delegated power; for the former supposeth a person to act in his own right, and not by a deputation, which no chancellor or official doth pretend unto. 1 *Still.* 330.

Note, *voluntary* jurisdiction is exercised in matters which require no judicial proceeding, as in granting probate of wills, letters of administration, sequestration of vacant benefices, institution, and such like; *contentious* jurisdiction is, where there is an action or judicial process, and consisteth in the hearing and determining of causes between party and party. *Ayl. Parerg.* 318.

And the distinction which bishop *Stillingfleet* here layeth down, between contentious and voluntary jurisdiction, as the one is supposed to be conveyed to the official, and the other to [293] remain in the bishop, is supported, as to the contentious jurisdiction, by the books of common law; which affirm that a bishop may well sue for a pension or other right before his own chancellor; and say, that the archbishop having constituted an official principal (as the dean of the arches) to receive appeals, cannot afterwards come into that court, and execute the office himself. Add to this, what is generally said, that if a bishop doth not constitute a chancellor, he may be obliged to do it by the archbishop of the province. *Gibs.* 926.

But as to the other branch, to wit, voluntary jurisdiction, as visitation, institution, licences, and the like; all this doth remain in the archbishop or bishop, notwithstanding the general grant of all and all manner of jurisdiction to the official. And therefore in our ancient ecclesiastical records, we find special commissions to hear and determine matters found and detected in the visitation, granted by the visitors to such persons whose zeal and integrity they could confide in, for the effectual prosecution of the crimes and vices detected. In like manner institutions, licences, and the like, can belong to chancellors no otherwise, than as the right of granting is conveyed to them distinctly and in express terms: And all that is here said of chancellors, holds equally in the case of commissaries and officials, according to the respective powers delegated to them. *Gibs.* 987.

Under the appellation of delegated jurisdiction, in a large

sense, may be comprehended the jurisdiction of archdeacons, who exercise such branches of episcopal power (in subordination to the bishops) as have been anciently assigned to them, especially the holding of visitations: and of deans, deans and chapters and prebendaries, who exercise episcopal jurisdiction of all kinds, independent from the bishops, though no jurisdiction at all could accrue to them otherwise than by grant from the bishops, or by the arbitrary and overruling power of the popes. Both of these, however, originally delegated, have long obtained the style of ordinary jurisdiction, as belonging of course and without any express commission to the several offices before-mentioned. *Gibs. Introd.* 22.

But the power which we properly call delegated, is the power of chancellors, commissaries, and officials; which they exercise by express commission from the respective ordinaries, to whose stations or offices such powers are annexed. *Id.*

[294] Continuance. 7. As the bishop may bound commissions in point of power, so he may also bound them in point of duration. The commission of official, for hearing of causes, is the only one which the bishop is pretended to be under an obligation to grant, and he (as official) hath less share than any other in the spiritual administration; and yet even in this the rule of the law is, that the power of officials ceaseth, not only by revocation, but by the death of him who deputed them. And the reason given for it is, that otherwise upon the death of the bishop the guardian of the spiritualties (and the same holds good of the successors also) might have an unacceptable person intailed upon him. Accordingly, before the reformation, and for some time after, we find new commissions for offices of all kinds generally granted together, after the consecration or translation of a new bishop; and those grants usually, either to continue during pleasure in express words, or without any mention of the continuance for life or other term, and so equally revocable at the pleasure of the bishop. The same seemeth to have continued, at least the common style, for some years in the reign of queen Elizabeth; and in the next reign we find it a question in the case of the prebend of Hatcherley, whether any confirmation could bind the successor; and though in the case of Dr. *Barker*, in the twenty-first year of king James, the court were of opinion, that the bishop had no right to take from him his office of commissary and vicar-general, which was granted for life, it is to be observed, that that grant had been made by deed from the bishop himself, who therefore was bound by his own act, and could not undo it at pleasure; but in the next reign, 3 *Cha.* in *Sutton's* case, it is mentioned again as a doubtful point, whether the grant of the predecessor (however confirmed) could bind the successor. *Gibs. Introd.* 25.

And it should seem that the grantees themselves doubted their title for life, in the known way of commissions, according to the ecclesiastical method; and therefore for greater security (no doubt by the advice of common lawyers) they obtained the offices by way of letters patents, with the *habendum* and other attendants on temporal grants: in which way they still continue. And it is now taken for clear law, in the case of bishops and other ordinaries, that the grant of an office for life by the predecessor, whether judicial or ministerial, if it be confirmed by the dean and chapter, is binding to the successor. But it is to be remembered, that this is an allowance, and not a command; the law [295] declares such grants good when made, but doth not direct them to be made; in this the bishop is at his own liberty as much as ever, no restraint therein being laid upon him by any law of this realm. *Gibs. Introd.* 25.

The same holds much more strongly in the case of grants for more lives, and grants in reversion. In favour of a grant for one life, it may be alleged, that the grantee, under the uncertainty of the life of the grantor, would have no encouragement to sequester him from all other business, and turn his thoughts wholly to the execution of that office; and that by the time he hath attained a competent knowledge of persons and things relating to it, he may be removed: but these cannot be pleaded in favour of grants for more lives, and grants in reversion. It is true, the temporal courts do so far restrain such grants, as to declare them void, unless warranted by precedents before the 1 *Eliz.* in the case of bishops, and before the 13 *Eliz.* in the case of others (in which years the two statutes were made against the laying these and the like unreasonable burdens upon successors); and they also do declare them void, unless they be granted freely and without reward, and unless the grantee (supposing him of full age) appear to have sufficient knowledge for the work. But they have allowed them to be good, upon the foundation of precedents subsequent to the 1 *Eliz.* on presumption that there might be precedents before; and they have also allowed grants to minors to be good, on presumption that in due time they will qualify themselves for the offices, and that until such time as they shall come of age they may supply the places by deputies. *Gibs. Introd.* 26.

Chantry.

CHANTRY, *cantaria*, was commonly a little chapel, or particular altar, in some cathedral or parochial church; endowed with lands or revenues, for the maintenance of a priest to pray for the souls of the founder and his friends.

A man might make a chantry by licence of the king, without the ordinary; for the ordinary hath nothing to do therewith.

[296] The main use and intent of these chantries was for prayers for souls departed, on a supposition of purgatory, and of being released from thence by masses satisfactory: And prayer for such souls was the general matter of all obits, anniversaries, and the like, which were but several forms of prayer for souls. *God.* 329.

These chantries were dissolved by the statute of the 1 *Ed.* 6. *c.* 14.

Chapel.

Chapel, whence so called.

1. WE have softened in English the pronunciation of the initial letters of this word, as we have done in many other like instances, for it is evidently the same with the Latin word *capella*: the Danish word is *kapel*, the Belgic, *capelle*, the Spanish, *capilla*. But from whence they have their derivation, seemeth not to have been satisfactorily accounted for. Perhaps the same may be a diminutive of the word *capa*, which hath been adopted to signify one of the priest's vestments, so called (saith *Lindwood*) *a capiendo*, from its containing or covering the whole back and shoulders. For chapels at first were only tents or tabernacles, sometimes called field churches, being nothing more than a covering from the inclemency of the seasons. And the metaphor is transferred with our English word *cope*, which is used to denominate the same vestment, and signifieth also a canopy, or other vaulted covering. So *coppe* denoteth the round top of a hill. So we say the *cape* of a wall; the *cape* of a coat; *cape*, a promontory, or other extremity; *cap*, a covering for the head; and other such like.

Private chapels.

2. Private chapels are such as noblemen and other religious and worthy persons have, at their own private charge, built in or near their own houses, for them and their families to perform religious duties in. These private chapels, and their ornaments, are maintained at those persons' charge to whom they belong; and chaplains provided for them by themselves, with honourable pensions: and these antiently were all consecrated by the bishop of the diocese, and ought to be so still. *Degge*, *P.* 1. *c.* 12.

Stratford. We do decree, that whosoever, against the prohibition of the canons, shall celebrate mass *in oratories*, chapels,
[297] houses, *or other places*, not consecrated, *without having obtained the licence of the diocesan*, shall be suspended from the celebration of divine service for the space of a month. And all licences granted by the bishops for celebrating mass in places not consecrated, other than to noblemen, or other great men of the realm,

living *at a considerable distance* from the church, or notoriously weak or infirm, shall be void. Nevertheless the heads, governors, and canons of cathedral churches, and others of the clergy, may celebrate mass in their oratories of antient erection, as hath been accustomed. Moreover, the priests who shall celebrate mass in oratories or chapels built by the kings or queens of England, or their children, shall not incur such pain. *Lind.* 233.

In oratories] An oratory differs from a church; for in a church there is appointed a certain endowment for the minister and others; but an oratory is that which is not built for saying mass, nor endowed, but ordained for prayer. *Lind.* 233.

Or other places] As suppose, in a tent, or in the open air. *Lind.* 233.

Without having obtained the licence of the diocesan] Such oratory any one may build without the consent of the bishop; but without the consent of the bishop, divine service may not be performed there. And this licence he shall not grant, for divine service there to be performed, upon the greater festivals. *Lind.* 233.

Abundance of such licences, both before and since the reformation, remain in our ecclesiastical records; not only for prayers and sermons, but, in some instances, for sacraments also. But the law is (as *Lindwood* hath it in his gloss on the said canon), that such licence be granted sparingly. And these restrictions were laid on private oratories, out of a just regard to places of public worship; that while the laws of the church provided for great infirmities, or great distance, such indulgence might not be abused to an unnecessary neglect of public or parochial communion. *Gibs.* 212.

And in the said oratories, a bell might not be put up without the bishop's authority. *Lind.* 233.

At a considerable distance] As suppose, a mile or more; and in such case, and not otherwise (saith *Lindwood*), the bishop ought to permit service to be performed there. *Lind.* 233.

By the 2 & 3 *Ed.* 6. *c.* 1. § 1. and 1 *El. c.* 2. § 4. *Open prayer* in and throughout those acts, is explained thereby to be, that prayer which is for others to come unto or hear, either in common churches, or private chapels or oratories. [298]

By the 23 *El. c.* 1. Every person which usually on the Sunday shall have in his house divine service which is established by the law of this realm, and be thereat himself usually present, and shall not obstinately refuse to come to church; and shall also four times in the year at least be present at the divine service in the church of the parish where he shall be resident, or in some other common church or chapel of ease; shall not incur the penalty of 20*l.* a month limited by the said act, for not repairing to church. § 12.

By *Can.* 71. No minister shall preach or administer the holy communion in any private house, except it be in times of necessity, when any being either so impotent as they cannot go to the church, or very dangerously sick, are desirous to be partakers of the holy sacrament; upon pain of suspension for the first offence, and excommunication for the second. Provided that houses are here reputed for private houses, wherein are no chapels dedicated and allowed by the ecclesiastical laws of this realm. And provided also, under the pain before expressed, that no chaplains do preach or administer the communion in any other places, but in the chapels of the said houses; and that also they do the same very seldom upon Sundays and holidays: so that both the lords and masters of the said houses, and their families, shall at other times resort to their own parish churches, and there receive the holy communion at the least once every year. (5)

Free chapels.

3. The distinction of free chapels is grounded on their freedom or exemption from all ordinary jurisdiction. *Gibs.* 210.

Sir *Simon Degge* says, it is agreed on all hands, that the king may erect a free chapel, and exempt it from the jurisdiction of the ordinary, or may license a subject so to do. *Degge, P.* 1. *c.* 12. (*g*)

And Dr. *Godolphin* says, the king may license a subject to found a chapel, and by his charter exempt it from the visitation of the ordinary. *God.* 145.

But Dr. *Gibson* observes nevertheless, that no instances are produced in confirmation hereof; it is true, he says, that many free chapels have been in the hands of subjects; but it doth not therefore follow, that those were not originally of royal foundation. *Gibs.* 211.

By a constitution of archbishop *Stratford*, as before mentioned, ministers which officiate in oratories or chapels erected by the
[299] kings or queens of England, *or their children*, shall not need to have the licence of the ordinary.

Or their children] Which word children extendeth not further than to grandchildren; after these, they are called posterity. *Lind.* 234.

All free chapels, together with the chantries, were given to the king in the first year of king Edward the sixth: except some

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(5) Repair of private chapel belongs to the owner, though annexed to the church (2 *Inst.* 489.), *aliter* of a public chapel. *Ibid.*

(*g*) By 26 *H.* 8. *c.* 3. § 2. and 1 *El. c.* 4. Free chapels are charged with first fruits; but this the late Mr. Serjt. *Hill* conjectures, must mean only such as were in the hands of subjects. No other chapels are expressly named in the statutes: parsonages and vicarages are expressly noticed; it seems that parochial chapels are included in those words; and chapels of ease were not supposed to have any revenue. *Serjt. Hill's MSS. Notes.*

few that are excepted in the acts of parliament by which they were given; or such as are founded by the king, or his licence, since the dissolution. *Degge, P.* 1. *c.* 12.

And the king himself visits his free chapels and hospitals, and not the ordinary: which office of visitation is executed for the king, by the lord high chancellor. *God.* 145.

Free chapels may continue such, in point of exemption from ordinary visitation; though the head or members do receive institution from the ordinary. *Gibs.* 211. [*Registr. f.* 307. *b.* cited *ibid.*]

In short, the sum of all is this: Free chapels (says the learned and accurate bishop *Tanner*) were places of religious worship exempt from all ordinary jurisdiction, save only, that the incumbents were generally instituted by the bishop, and inducted by the archdeacon of the place. Most of these chapels were built upon the manors and ancient demesnes of the crown, whilst in the king's hands, for the use of himself and retinue when he came to reside there. And when the crown parted with those estates, the chapels went along with them, and retained their first freedom; but some lords having had free chapels in manors that do not appear to have been antient demesne of the crown, such are thought to have been built and privileged by grants from the crown. *Tanner's Notit. Monast. Pref.* 28.

Chapels of ease under a mother church [and parochial chapels.]

4. Of chapels subject to a mother church, some are merely chapels of ease, others chapels of ease and parochial. *Gibs.* 209. (*h*)

A chapel merely of ease, is that which was not allowed a font at its institution, and which is used only for the ease of the parishioners in prayers and preaching, (sacraments and burials being received and performed at the mother church,) and commonly where the curate is removeable at the pleasure of the parochial minister; according to what *Lindwood* saith, where the minister of the mother church hath the cure of them both, yet he exerciseth the cure there by a vicar not perpetual, but temporary and removeable at pleasure: though in this case, *Lindwood* observes elsewhere, that there may be in other respects [300] the rights of a parochial chapel by custom. But where a chapel is instituted, though with parochial rights, there is usually (if not always) a reservation, of repairing to the mother church, on a certain day or days, in order to preserve the subordination. *Gibs.* 209.

A parochial chapel is that which hath the parochial rights of christening and burying; and this differeth in nothing from a church, but in the want of a rectory and endowment. *Degge, P.* 1. *c.* 12.

For the privileges of administering the sacraments (especially

(*h*) But *quære*, if they can be both at the same time?

that of baptism) and the office of burial, are the proper rites and jurisdiction that make it no longer a depending chapel of ease, but a separate parochial chapel. For the liberties of baptism and sepulture, are the true distinct parochial rites. (6) And if any new oratory hath acquired and enjoyed this immunity, then it differeth not from a parish church but (says Mr. *Selden*) may be styled *capella parochialis.* And till the year 1300, in all trials of the rights of particular churches, if it could be proved that any chapel had a custom for free baptism and burial, such place was adjudged to be a parochial church. (*i*) Hence at the first erection of these chapels, while they were designed to continue in subjection to the mother church, express care was taken at the ordination of them, that there should be no allowance of font or bells, or any thing that might be to the prejudice of the old church. (*k*) And when any subordinate chapel did assume the liberty of burial, it was always judged an usurpation upon the rights of the mother church, to which the dead bodies of all inhabitants ought to be duly brought, and there alone interred. And if any doubt arose, whether a village were within the bounds of such a parish; no argument could more directly prove the affirmative, than evidence given, that the inhabitants of that village did bury their dead in the churchyard of the said parish. *Ken. Par. Ant.* 590, 591.

Their endowment and dependence.

5. When by long use and custom parochial bounds became fixed and settled, many of the parishes were still so large, that some of the remote hamlets found it very inconvenient to be at so great a distance from the church; and therefore for the relief and ease of such inhabitants, this new method was practised of
[301] building private oratories or chapels in any such remote hamlet

(6) If a chapel has parochial rights, as clerk, wardens, &c.; rights of divine service, as baptism, sepulture, &c., and the inhabitants have a right to them there and not elsewhere, and the curate has small tithes and surplice fees, and an augmentation; it is a perpetual curacy, and the curate is not removeable at pleasure. But chapels of ease are merely *ad libitum*, and have no parochial rights: therefore, on the union of the two parishes, one is frequently deemed the parish church, and the other a parochial chapel, but not a chapel of ease. *Atto. Gen.* v. *Brereton*, 2 *Vesey*, 425. 427.

(*i*) Keate was libelled against, in several articles, at the promotion of the rector of St. George, Hanover-square, for baptizing, marrying, and administering the sacrament in a chapel in the parish, without a licence from the bishop, and for collecting money in the chapel, in the offertory, and not paying the said money to the minister or churchwardens of the said parish. The court discharged a rule for shewing cause, why a prohibition should not go; for these are matters of spiritual conusance. *Keate* v. *Bp. of London, Serjt. Hill's MSS. notes.*

(*k*) *Nulla ecclesia est in præjudicium alterius construenda.* X. 5. 32. 1.

in which a capellane was sometimes endowed by the lord of the manor, or some other benefactor, but generally maintained by a stipend from the parish priest, to whom all the rights and dues were entirely preserved. *Ken. Par. Ant.* 587.

But in order to authorize the erecting of a chapel of ease, the joint consent of the diocesan, the patron, and the incumbent (if the church was full) were [and as it seemeth still are] all required. *Ken. Par. Ant.* 585, 586.

By a constitution of Othobon : When a private person desireth to have a chapel of his own, and the bishop for just cause hath granted the same, the said bishop hath always provided, that this be done without prejudice to the right of any other; agreeably whereunto we do injoin, that the chaplains ministering in such chapels, which have been granted saving the right of the mother church, shall render to the rector of the said church all oblations and other things, which, if the said chaplains did not receive them, ought to accrue to the said mother church: and if any shall neglect or refuse so to do, he shall incur the pain of suspension until he shall conform. *Athon.* 112.

But this is to be understood, unless a special privilege or antient custom do allow the contrary; or unless by composition with the rector of the mother church, he do retain yearly the fruits arising within the chapelry, paying for the same something in certain to the said rector. *Athon.* 112.

For a chapel may prescribe for tithes against the mother church. Thus in the case of *Sayer* and *Bland* (4 *Leon.* 24.), when the parson libelled for tithes against an inhabitant of a hamlet where was a chapel of ease, and it was shewed on the other side, that time out of mind the said hamlet had found a clerk to do divine service in the said chapel with part of their tithes, and (what was an usual composition upon the erection of a chapel) paid a certain sum of money to the parson and his predecessors for all tithes; the prescription was held to be good, and a prohibition was granted. *Gibs.* 209.

And at the consecration of a chapel, there was often some fixed endowment given to it, for its more light and easy dependence on the mother church: in some places being endowed with lands or tithes, and in some places by voluntary contributions. *Degge, P.* 1. *c.* 12.

Yet nevertheless, at the first there were very many signs of the dependence of chapels on the mother church; of which the [302]
prime and most effectual was the payment of tithes and offerings, and all profits whatsoever to the incumbent of the mother church. And therefore when such chapels were first allowed, a particular reserve was always made, that such a new foundation should be no prejudice to the parish priest and church. The constitutions of *Egbert* archbishop of York in the year 750, do take

care that churches of antient institution should not be deprived of tithes or any other rights, by giving or allotting any part to new oratories. The same was also provided in council under king Ethelred, by the advice of his two archbishops Alpheg and Wulstan. Which constitution is also found in an elder council of Mentz; and in the imperial capitularies. And by the laws of king *Edgar* made about the year 970, it was ordained, that every man should pay his tithes to the *ealdan mynstre*, to the elder or mother church: Only if a thain or lord should have within his own see a church with a burial place (that is, a parochial chapel) he might give a third part of his tithes to it; but if it had no privilege of burial (that is, if it were a bare appendant chapel) then the law was, to maintain the priest out of his nine parts, that is, purely at his own charge, without laying any part of the burden on the priest of the parish church. *Ken. Par. Ant.* 594.

Another mark of dependence on the mother church was this: The inhabitants of the village which was thus accommodated with a chapel, were upon some festivals to repair to the mother church, as an expression of duty and obedience to it. This practice was enjoined by the 31st canon of the council of Agatha, and recommended by a decree of *Gratian*, and obtained as a custom in this kingdom. Yea, when chapels were first allowed to our colleges in Oxford, it was generally provided, that such liberty should be no prejudice to the parish church; and that the scholars of every such house should frequent the said parochial church in the greater solemnities of the year. Which custom doth still prevail at Lincoln college, where the rector and fellows on Michaelmas day go in their respective habits to the church of St. Michael, and on the day of all saints to the church of All-hallows. *Ken. Par. Ant.* 595.

Nor did the inhabitants of any village so privileged with a chapel barely visit the mother church, and join in the divine service; but as a farther sign of subjection, they made their oblations, and paid some accustomed dues at those solemn sea-
[303] sons. This was sometimes done upon every one of the three greater festivals of Christmas, Easter, and Whitsunday. Sometimes those offerings were made only on the day of the dedication of the mother church. At other times and places, these solemn oblations were made only at Whitsuntide, and this chiefly in cathedral and conventual churches, where, among all parish churches that were appropriated to them, or of their patronage, the priests and people came in solemn procession within the week of pentecost, and brought their usual offerings. Whereupon we may fairly presume, that this old custom gave birth and name to the *pentecostals* or whitsun-contributions that were

allotted to the bishops, and are still paid in some few dioceses. *Ken. Par. Ant.* 596, 597.

It was a farther honour done to mother churches, that all the hamlets and distant villages of a large parish, made one of their annual processions to the parochial church, with flags and streamers, and other ensigns of joy and triumph. This custom might possibly after the conquest be introduced by the Normans; for among the ecclesiastical constitutions made in Normandy in the year 1080, it is decreed, that once in a year about pentecost, the priests and capellanes should come with their people in a full procession to the mother church, and for every house should offer on the altar a wax taper to enlighten the church, or something of like value. *Ken. Par. Ant.* 598.

Moreover, the capellane or curate of a chapel was to be bound by an oath of due reverence and obedience to the rector or vicar of the mother church. This act of submission is enjoined by a constitution of archbishop *Winchelsea.* And the oath was this: *That to the parochial church and the rector and vicar of it, they would do no manner of hurt or prejudice in their oblations, portions, and all accustomed dues; but as much as lay in their power, would defend and secure them in all respects: that they would by no means raise, uphold, or any way abet any grudges, quarrels, difference, or contention, between the said rector or vicar and his parishioners; but as far as in them lay, would promote and maintain peace and charity between them.* And it was ordained that all stipendiary priests and capellanes should make such oath before the rector or vicar or their deputy, on the first Sunday or festival after their admission; and should not presume to celebrate divine service before such oath was actually taken (at least if the rector or vicar did insist upon it) on penalty of incurring irregularity, and such other punishments as the canons did inflict on all that violated the constitutions of the holy church. And if the said capellanes, after such oath taken, should be convicted [304]
of the breach of it, or if suspected should not be able to purge themselves, that then they should be turned out and proceeded against as perjured persons. And if any capellane renounced this obedience, and presumed to act in contempt of the mother church and the incumbent of it; a judicial process was formed against him, of which the issue was to eject and suspend him. *Ken. Par. Ant.* 599, 600.

And Dr. *Kennet* says, this canon remaineth still in its full force. *Ken. Par. Ant.* 601.

And Mr. *Johnson* saith accordingly, that they who officiate in any chapel of ease, do to this day swear obedience to the incumbent of the mother church. *Johns.* 205.

The inhabitants of a precinct where there is a chapel, though it is a parochial chapel, and though they do repair that chapel,

are nevertheless of common right contributory to the repairs of the mother church. If they have seats at the mother church, to go thither when they please, or receive sacraments or sacramentals, or marry, christen, or bury at it, there can be no pretence for a discharge. Nor can any thing support that plea, but that they have time out of mind been discharged (which also is doubted whether it be of itself a full discharge): or that in consideration thereof, they have paid so much to the repair of the church, or the wall of the churchyard, or the keeping of a bell, or the like compositions (which are clearly a discharge). *Gibs.* 197. (*l*)

Dr. *Godolphin* says, it is contrary to common right, that they who have a chapel of ease in a village, should be discharged of repairing the mother church; for it may be that the church, being built with stone, may not need any reparation within the memory of man; and yet that doth not discharge them, without some special cause of discharge shewed. *God.* 153.

If the chapel be three miles distant from the mother church, and the inhabitants who have used to come to the chapel, have used always to repair the chapel, and there marry and bury, and have never within sixty years been charged to repair the mother church; yet this is not any cause to have a prohibition:
[305] but they ought to shew in the spiritual court their exemption, if they have any, upon the endowment. 2 *Roll's Abr.* 290.

But if the inhabitants of a chapelry prescribe to be discharged time out of mind of the reparation of the mother church, and they are sued for the reparation of the mother church, a prohibition lieth upon this surmise. 2 *Roll's Abr.* 290.

T. 1 *W. Ball* and *Cross.* The inhabitants of a chapelry within a parish, were prosecuted in the ecclesiastical court, for not paying towards the repairs of the parish church; and the case was, those of the chapelry never had contributed, but always buried at the mother church, till about Henry the eighth's time the bishop was prevailed on to consecrate them a burial place, in consideration of which they agreed to pay towards the repair of the mother church. All which appeared upon the libel. And it was held by *Holt* chief justice; that those of a chapelry may prescribe to be exempt from repairing the mother church, as where it buries and christens within itself, and hath never contributed to the mother church; for in that case it shall be intended co-eval, and not a latter erection in ease of those of the chapelry: but here it appears, that the chapel could be only an erection in ease and favour of them of the chapelry; for they of the chapelry buried at the mother church till Henry the eighth's time, and then undertook to contribute to the repairs

(*l*) 2 *Rol. Rep.* 265. *Hob.* 66.

of the mother church. 1 *Salk.* 164, 165. And although at the first sight, this may seem somewhat hard, yet it hath this good foundation of reason; that all chapels, and all discharges from attending divine service at the mother church, were originally matters of grace and favour; and the ease and convenience of particular inhabitants, ought not to be purchased with inconvenience and damage to the mother church; in whose right it was specially provided on those occasions, that nothing should be done in prejudice thereof. *Gibs.* 209.

[Every new church built by the commissioners appointed for building churches by 58 *G.* 3. *c.* 45. and intended as the parish church of any division of a parish intended to be a *separate* parish, is a chapel of ease, *during the existing incumbency* of the original parish church, and shall be served by a curate nominated by such incumbent, licensed by the bishop, and paid by the commissioners, 58 *G.* 3. *c.* 45. § 18. 59 *G.* 3. *c.* 134. § 12.; and a chapel built as above, and situate in a *district* parish made a parish for ecclesiastical purposes, and which is not the church of the district, is not to be deemed a perpetual curacy or benefice presentative, even *after* avoidance by the existing incumbent, 59 *G.* 3. *c.* 134. § 19.; see 58 *G.* 3. *c.* 45. § 25. Churches, *infra.*] [New churches, when chapels of ease.]

6. The repairs of a chapel are to be made by rates on the landholders within the chapelry, in the same manner as the repairs of a church; and such rates are to be enforced by ecclesiastical authority. *Gibs.* 209. How to be repaired; [See *infra,* tit. Church. VI. IX.]

And there shall be the like appeals to the ordinary for unequal assessments.——But all this must be intended of antient chapels, and where this course hath been used; for if there be land given for the repair of them, or any land or estate charged by prescription to the repairs of them, then the custom must be observed. *Degge*, *P.* 1. *c.* 12. (7)

7. The cure of chapels of ease, in many places, is to be per- How to be supplied. (8)

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(7) A rate to reimburse churchwardens such sums as they had expended or might thereafter expend on the parish church, would be bad on the face of it, as in part *retrospective;* and therefore the court would not grant a mandamus to the chapelwardens of a township within the parish to make such a rate for raising their accustomed proportion of the whole; and their refusal to make such a rate, when demanded, applying as well to the form as to the substance of the demand, the court would not grant the mandamus to raise the money in the common form of such a rate *prospectively*, out of which the churchwardens might repay themselves. *The King* v. *Haworth (Chapelwardens)*, 12 *East*, 556. Nor will equity decree a church-rate to be made to reimburse a former churchwarden monies laid out while in office in pursuance of an order of vestry. *Lanchester* v. *Thompson and others*, 5 *Madd.* 64.

(8) A bishop cannot consecrate a chapel, or authorize a person to preach in it, without the consent of the incumbent of the parish. *Carr* v. *Marsh*, 2 *Phill. Rep.* 198.

formed by those that have the cure of souls in the parish. *Degge, P.* 1. *c.* 12.

And in such case the incumbent of the mother church, being bound to find a chaplain there, may himself serve in the chapel, as well as his curate or chaplain. *Wats. c.* 32. (*m*)

By agreement (of the bishop, patron, and incumbent), the inhabitants may have a right to elect and nominate a capellane. Otherwise, the antient custom was, that he was either arbitrarily appointed by the vicar; or by him nominated to the rector and convent, whose approbation did admit him; or was nominated by the inhabitants (as founders and patrons) to the vicar, and by him presented to the ordinary: for custom herein was different: sometimes a capellane was to be presented by the patron of the church to the vicar, and by him to the archdeacon, who was then obliged to admit him; at other times the lord of the manor did present a fit person to the appropriators, who, without delay, were to give admission to the person so presented. *Ken. Par. Ant.* 589. (9)

(*m*) *Hob.* 67.

(9) The right to nominate to a chapel of ease is in the incumbent of the mother church, though the chapel was erected and endowed with lands by the lord and freeholders of a manor, and though the right of nomination was given to the inhabitants by the archbishop, in his deed of consecration, declaring that the vicar had no right to nominate. Thus, though the inhabitants had repaired the chapel and nominated for 90 years, it was held, that the incumbent cannot lose his right but by agreement between patron, parson, and ordinary, and then only on a compensation made to him, or by prescription in the inhabitants; which presumes every thing was proper, and presupposes an agreement by *deed*, and not by parol. *Dixon* v. *Kershaw and others*, *Ambler.* 528. *cor.* lord *Northington.* And the incumbent cannot lose his right, though he declares at the time that he has no right to nominate. *Dixon* v. *Metcalfe*, *ibid.* and 2 *Eden.* 360. See *Fearon* v. *Webb*, 14 *Ves.* 13. In *Duke of Portland* v. *Bingham*, 1 *Hagg. Rep.* 168., lord *Stowell* says, that the implied right of patronage to a chapel, arising from the right of patronage to the mother church, is considered, since *Dixon* v. *Kershaw*, as settled in favour of the incumbent. In *Herbert* v. *Dean and Chapter of Westminster*, 1 *Peere Williams*, 774., it was finally settled that the right of nomination lay in the latter, after a strong inclination of the chancellor's mind to lodge it otherwise. But they were spiritual persons possessing the same rights *pleno et utroque jure*, which the abbot and monks had done before. They were actual incumbents, and served the church and chapels of St. Margaret by *one of their own body*, and were in that character entitled to nominate. But a lay rector, disabled by his lay character from any power of serving the church, cannot, till that incapacity be removed, enjoy the same precise extent of right as was attributed to the dean and chapter in their spiritual character. 1 *Hagg.* 169. So in *Mallet* v. *Trigg*, *Nottingham* C. ob-

8. Chapels of ease have the like officers for the most part as churches have, distinguished only in name. *Degge*, P. 1. c. 12. — Government thereof.

And are in like manner visitable by the ordinary. *Degge*, P. 1. c. 12.

9. It is said by *Rolle*, that if the question be in the court christian, whether a church be a parish church, or only chapel of ease, a prohibition lieth. 2 *Roll's Abr.* 291. — Church, or chapel, how to be tried.

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And Dr. *Watson* saith, if the defendant in a *quare impedit* shall plead that the same is a chapel and no church; this matter shall be tried by the country, and not by the bishop. *Wats.* c. 23.

But Dr. *Gibson* saith, that a chapel or no chapel ought to be tried by the spiritual judge: for a chapel is spiritual as well as a church; and when two spiritual things are to be tried, no prohibition shall be granted; in like manner, as it goeth not, when a *modus* is pleaded, in a dispute between two spiritual persons, to wit, the rector and vicar, about tithes. *Gibs.* 210.

But he says, if a question is depending as to the *limits* thereof, whether a chapel of ease or a parish church, or whether a chapel of ease or a parochial chapel; the same shall be tried, as to the limits, in the temporal court. *Gibs.* 213.

When the question was, whether it were a church or chapel belonging to the mother church, the issue was, whether it had a font and burying place; for if it had the administration of sacraments and sepulture, it was judged in law a church. 2 *Inst.* 363.

If a person be patron of a chapel that hath parochial right, and doth present thereto by the name of a church, and the presentees have been received thereto, as to a church; it is no longer a chapel but a church; and if a disturbance happen upon any avoidance thereof, the patron may have his *quare impedit* as to a church. *Wats.* c. 23. 2 *Inst.* 363.

But on the contrary, a presentation to a church by the name of a chapel will not make it cease to be a church; for the case was, that in the time of *Hen.* 3. there were two rectories, *A* and *B*, and the patron of *A* purchased the rectory of *B*. After which, constantly, presentations were to the church of *A* with the chapel of *B*. And it was resolved, that although the patron of *A*, ever after the said purchase, had presented only unto the said church of *A* with the chapel of *B*, yet *B*, notwithstanding, remained in right a church, and the freehold of it in suspence. *Wats.* c. 23. *Sav.* 17, 18. (n)

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served, "there was a great difference as to the parson's right of naming or choosing his vicar, where the parson was of a *lay fee*, and where he had a *cure of souls*: for in the latter case there was reason he should approve of the man who was to act under him in so high a trust." 1 *Vernon*, 42.

(n) These cases are governed by the maxim, *nomina sunt mutabilia res autem immobiles.* 6 *Co.* 66.

The particular duties, privileges, and appointments relating to ministers officiating in chapels, are treated of under the title **Curates.**

Chapter. See **Deans and Chapters.**

Charitable uses.

CONCERNING lands given in *mortmain* to charitable uses, see title **Mortmain.** (And note, that by 9 *G.* 2. *c.* 36. no *land*, or money to be laid out in land, can be left by will to charitable uses. *See same title.*)

By the 43 *El. c.* 4. (1) Whereas divers lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, have been heretofore given, limited, appointed, and assigned, as well by the queen's majesty, and her progenitors, as by sundry other well disposed persons; *some for relief* of aged, impotent, and poor people; some for maintenance of sick and maimed soldiers and mariners, *schools of learning*, free schools, and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; some for education and preferment of orphans; some for or towards relief, stock, or maintenance for houses of correction; some for marriages of poor maids; some for supportation, aid, and help of young tradesmen, handicraftmen, and persons decayed; and other for relief or redemption of prisoners or captives; and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes; which nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of fraud, breaches of trust, and negligence in those that should pay, deliver, and employ the same: For remedy whereof, it is enacted, that it shall be lawful for the lord chancellor or keeper of the great seal of *England*, and for the chancellor of the duchy of *Lancaster*, for lands within

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(1) By construction of this statute, it is held, that a devise to a corporation for a charitable use is valid, as operating in the nature of an appointment rather than of a bequest. This statute, which favours appointments to charities, supersedes and repeals all former statutes, (*Jennor* v. *Harper*, *Gilb. Rep.* 45. 1 *P. Wms.* 248), and supplies all defects of assurances (*Duke's Char. Uses*, 84.); and therefore not only a devise to a corporation, but a devise by a copyhold tenant, without surrendering to the use of his will (*Moor*, 890.), and a devise (nay, even a settlement) by tenant in tail, without either fine or recovery, if made to a charitable use, are good by way of appointment. *Att. Gen.* ex relat. *Pettifer* v. *Rye and another*, 2 *Vern.* 453. *Ch. Prec.* 16, 391. 2 *Bl. Com.* 375, 376.

the county palatine of *Lancaster*, from time to time to award commissions (*o*) *to the bishop of every several diocese respectively*, and his

(*o*) [The commission is returned into the petty bag office in chancery: the review of the commissioners' decree is to be had by bill in equity. In *Rockley* v. *Kelly*, *Prec. Ch.* 111., on a doubt whether under 43 *El. c.* 4. exceptions to such a decree could be heard at the rolls, his honour refused to interfere. *Blackstone* says, it is not a proceeding at common law, though done in the petty bag office, but is treated as an original cause in the court of equity; and that, being considered as such, an appeal of course lies from the chancellor's decree to the house of peers, notwithstanding any loose opinions to the contrary. 3 *Bl. Com.* 428, citing *Corporation of Burford* v. *Lenthal*, *Canc.* 9th May, 1743, and *Duke*, 62. 128. *acc.* *Saul* v. *Wilson*, 2 *Vernon*, 118. *Show. Parl. Cas.* 110. and *Windsor* v. *Farnham* (*Inhabs.*), *Cro. Car.* 40. *contra.* It would be impracticable, at the same time that it is foreign to the general objects of this work, to particularize more of the complicated law of charitable uses, than is contained in this title of our author, in the following notes, and in those annexed to tits. Colleges, Mortmain, and Schools.]

Concerning these commissions, lord *Coke* says, that six things are to be observed. 1. The number must be four or more. 2. The commissioners to be the bishop and chancellor of that diocese (if there be a bishop), and other persons of good and sound behaviour. 3. In that commission any four of them do suffice to make orders and decrees; for therein none is of the quorum. 4. None shall be commissioners that have any part of the lands, &c. or goods or chattels, money or stocks in question. 5. The commission is to limit a certain time, within which the commissioners are to order, decree, and certify. 6. Their authority is to inquire, as well by the oath of twelve lawful men or more, as by all other good ways and means. And the commissioners have power to inquire of these nine things. 1. Of abuses. 2. Breaches of trust. 3. Negligences. 4. Misemployments. 5. Not employing. 6. Concealing. 7. Defrauding. 8. Misconverting. 9. Misgovernment of any lands or tenements, goods, money, &c. given to any of the charitable uses aforesaid. Their order and decree is to be certified on parchment, under their hands and seals, into the court of chancery of England, or of the county palatine of Lancaster, as the case shall require; and the remedy for the party thereby grieved is by bill in those respective courts. 2 *Inst.* 710. The court of chancery will also relieve by original bill, upon a gift to charitable uses within the statute (43 *El. c.* 4.); and by a bill filed by and in the name of the attorney-general, will settle or direct the disposition of an estate within that statute, according to the intention of the testator. 1 *Ca. in Ch.* 134. 2 *Ca. in Ch.* 267. 2 *Vern.* 387. But in practice, upon a bill for an account of a legacy given to a charity, the attorney-general need not be made a party, but the master may report the legacy, and the parties come before him and claim. *Chitty* v. *Parker*, 4 *Br. C. C.* 48. And where the officers of the crown institute a suit, they generally name a relator, in order that costs may be awarded against him, in case it should appear to have been improperly instituted or conducted.

chancellor, (*in case there shall be any bishop* of that diocese at the time of awarding the commission), and other persons of good and

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Mitford, 23. [The rule, that an information for a private charity cannot be dismissed; but that there must be a decree (*Atto. Gen.* v. *Smart*, 1 *Ves.* 72.), does not extend to those founded by the crown, which is of higher authority than the court (*ibid.*), nor to cases where there is a charter; for in that case it must be regulated according to the powers of that charter, or left to the original rules of law. *Atto. Gen.* v. *Middleton*, 2 *Ves.* 328. But equity has jurisdiction over all charities under 52 *G.* 3. *c.* 101., for the purpose of administering the funds, even though created by royal charter; provided the application does not extend to regulate or alter the charity, in which case the crown only can interfere by virtue of its visitatorial power. In re *Chertsey Market, Daniell*, 261. 6 *Price*, 174.] The court of chancery, proceeding on the above-mentioned principle, has decided, that a legacy to some *public* charity is sufficiently certain, but that the executors ought to dispose of it under the eye of the court (*Widmore* v. *The Governors of Q. Anne's Bounty*, 1 *Br. C. C.* 13.); [for the word "public" is only a word of distinction. Each particular object may be private, but it is the extensiveness of the will which makes a charity public. *Atto. Gen.* v. *Pearce*, 2 *Atk.* 87. *Barn.* 288.] And a legacy to *The Lying-in Hospital; and if there should be more than one, to such of them as the executors should appoint*, was supported, though the testator afterwards struck out the executor's name, and died without appointing another. *White* v. *White*, 1 *Br. C. C.* 12. 7 *Ves.* 423. As was a charge of 1000*l.* on a manor to be applied to *such charitable uses as the testator had by writing under his hand formerly directed*, though no such writing was found. *Atto. Gen.* v. *Syderfen*, 1 *Vern.* 224. And the gift of a residue of personal estate to such charitable uses as the executor should appoint, *recommending poor clergymen*, though the executor died in the lifetime of the testatrix. *Moggridge* v. *Thackwell*, 3 *Br. C. C.* 517. 1 *Ves. jun.* 469. And a charitable bequest, where two out of three of the executors, who were to have a discretionary choice of the objects, died before the charity took place. *Atto. Gen.* v. *Glegg*, *Amb.* 584.

The devise of a residue *to charitable and pious uses*, [is sufficiently certain,] though no uses whatever were declared, in which case the king is to appoint under sign manual. *Atto. Gen.* v. *Herrick*, *Amb.* 712. Which prerogative also holds where the use declared is against the policy of the law, as to establish [an assembly for reading the jewish law and advancing the jewish religion (*De Costa* v. *De Paz.* 6 *Dec.* 1743. *Amb.* 228. 1 *Dick.* 258. 2 *Ves.* 274. 276. 7 *Ves.* 76. 2 *Jac. & Walk.* 308.), and a more accurate report (2 *Swanst. Rep.* 487. *note* (*a*); in which case the king gave the legacy to the Foundling hospital. See Jews.] But where a testatrix gave several legacies and annuities out of her estate, and the residue to be disposed of in charity to such persons, and in such manner *as the executors or the survivors of them should think fit*, lord *Hardwicke*, though he referred it to the master to appoint additional trustees to sustain the annuities, said, that the new trustees could not dispose of the residue in charity, as the testatrix had confined that power to her executors, and reserved

sound behaviour; authorizing them thereby, or any four or more of them, to inquire, *as well by the oaths of twelve lawful men*, or

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an application to the court for further directions in case of the death of either of the survivors. *Hibbard* v. *Lambe*, *Amb.* 309. Upon the same principle, and *Ut res magis valeat*, a legacy to the *poor inhabitants of St. Leonard, Shoreditch*, was sustained, and directed to be given to the poor inhabitants not receiving alms. *Atto. Gen* v. *Clarke*, *Amb.* 422. And a bequest *to the poor*, by a French refugee, was ordered to be given to poor refugees. *Atto. Gen.* v. *Rance*, *Ib.* And a bequest of a residue, for the *augmentation of the charitable collections which should be made for the benefit of poor dissenting ministers of the gospel in any of the counties in England*, was holden not to be too vague; and it appearing to the court that there were three denominations of dissenters in this kingdom, presbyterians, independents, and baptists, and that the subscriptions for the support of their ministers were distributed by their respective treasurers, the money was ordered to be paid to them for the support of the ministry in general. *Waller* v. *Childs*, *Amb.* 524. It is however to be observed, that summary powers given to the lord chancellor to vary provisions relative to a trust, do not extend to alter the original constitution of the trust itself; and therefore where seven trustees out of twelve were required by a private act of parliament to constitute a quorum, lord *Thurlow* refused, on the application and consent of all the trustees, to increase the number to sixteen, or diminish the quorum to five, though the act provided, that if any of the constitutions thereof should be found inconvenient or impracticable, they might be varied by the lord chancellor, and it was stated to be impracticable to gather together so large a number as seven out of twelve trustees; the proper application, in this instance, being to parliament. *Ex parte Bolton school*, 2 *Br. C. C.* 662. But where a charity is so given that there can be no objects of it, the court will order a different scheme to be laid before it. *Atto. Gen.* v. *Oglander*, 3 *Br. C. C.* 166. *Same* v. *Bp. of Chester*, 1 *Br. C. C.* 444. So a trust being created for the propagation of the christian religion among the natives of New England, the object of which failed from there being no infidels to convert within the intended limits, and the colleges which had been appointed administrators of the charity being now subject to a foreign power, the states of America, the master was directed to propose a plan *de novo* for the application of the produce of the estates according to the intentions of the testator. *Atto. Gen.* v. *City of London*, 3 *Br. C. C.* 171. But if the objects may exist, though they do not at present, as widows, or a bishop in America, the money must remain in court. 1 *Br. C. C.* 166. 3 *Br. C. C.* 444. And see *Bridgm. Dig.* tit. *Charitable Uses*, IV. V. VI.

Where a residue of personalty is left to charitable uses, which proves to be more than sufficient for the object, if it appear to be the testator's intention to dispose of the *whole surplus*, the whole must be applied to similar purposes. *Atto. Gen.* v. *Earl of Winchelsea*, 3 *Br. C. C.* 373. So where an estate is given to a charity, and the rents are afterwards increased, there is no resulting trust for the heir at law, if the testator has not expressed such an intention, but the charity shall have the benefit of the surplus rents. *Atto. Gen.* v. *Haberdashers'*

more of the county, as by all other good and lawful ways and means, of all and singular such gifts, limitations, assignments, and appointments aforesaid, and of the abuses, breaches of trusts, negligences, misemployments, not employing, concealing, defrauding, misconverting, or misgovernment, of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stocks of money, heretofore given, limited, appointed, or assigned, or which hereafter shall be given, limited, appointed, or assigned, to or for any the charitable and godly uses before rehearsed. And

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Company, 4 *Br.* 103. *S. P. Amb.* 190. 201. But if a specific object be pointed out, as the building of a church, or giving money to the inhabitants of particular houses, that object must be effectuated *in toto* or not at all; and if it fail, the property will fall to the next of kin or heir at law. *Atto. Gen.* v. *Bp. of Oxford*, 1 *Br.* 144. *Same* v. *Goulding*, 2 *Br.* 428.; and see *Bridgm. Dig.* tit. *Charitable Uses*, VIII. Where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign manual: but where the execution is to be by a trustee, with *general* or *some* objects pointed out, there the court will take the administration of the trust. *Moggridge* v. *Thackwell*, 7 *Ves.* 36. 13 *Ves.* 416. A residuary bequest being given for the purpose of educating and bringing up poor children in the Roman Catholic religion, which was illegal, it was held, that the disposition of it belonged to the crown by sign manual. *Cary* v. *Abbot*, 7 *Ves.* 490. The nature of a charity cannot be changed by an application to objects different from those intended by the founder, unless it be clear, that by a strict adherence to the plan his general object will be destroyed. *Atto. Gen.* v. *Whiteley*, 11 *Ves.* 241. It has now become a general rule, that the court will not marshal assets for a charity. See the cases collected. See *Bridgm. Digest*, tit. *Charitable Uses*, X. and *infra*, title Mortmain, in the notes. Lord *Hardwicke* refused to give directions for the distribution of a charity, where the objects of it belonged to another jurisdiction, though he directed the securities to be transferred to the devisees in order to be applied to the trusts of the will. *Provost of Edinburgh* v. *Aubery*, *Amb.* 236. [Equity will not extend visitatorial powers which, as being summary and arbitrary, are liable to abuse. *Atto. Gen.* v. *Middleton*, 2 *Ves.* 328. It is no objection to persons being visitors that they have the legal estate in them; but otherwise if they are invested with receipt of the revenues, for they cannot visit and account to themselves. *Ib.* 10 *Rep.* 31. 2 *Ves. jun.* 42. S. P. Equity will not interfere with visitors where they have not the management of the revenues, but will do so where they do not remedy abuses affecting them. *Atto. Gen.* v. *Bedford Corporation*, 2 *Ves.* 505. *Ex parte Berkhampstead School*, 2 *Ves. & B.* 134. Any substantial deviation from the principle and purpose of the institution is the subject of visitatorial jurisdiction. *Atto. Gen.* v. *Clarendon*, 17 *Ves.* 491. and see the *Kirkby Ravensworth* case, 8 *East*, 221. 15 *Ves.* 305. *infra*, 316. *note.* And as to the farther regulation of eleemosynary or charitable foundations by the visitor, or if none be appointed by the court of chancery, see title College, in the notes.

after, the said commissioners, or any four or more of them (*upon calling the parties interested* in any such lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money,) shall make inquiry by the oaths of twelve men or more, of the said county (whereunto the said parties interested may have their lawful challenges); and upon such inquiry, hearing, and examining thereof, set down such orders, judgments, and decrees, as the said lands, tenements, rents, annuities, profits, goods, chattels, money, and stocks of money, may be duly and faithfully employed, to and for such of the charitable uses and intents before rehearsed respectively, for which they were given. Which orders, judgments, and decrees, not being contrary to the orders, statutes, or decrees of the donors or founders, shall stand firm and good, and be executed accordingly, until the same shall be undone or altered by the lord chancellor or lord keeper or chancellor of the county palatine of Lancaster respectively, upon complaint by any party grieved to be made unto them. § 1.

Provided, that this shall not extend to any lands, tenements, rents, annuities, profits, goods, chattels, money, or stocks of money, given or which shall be given to any college, hall, or house of learning within the universities of Oxford or Cambridge; or to any of the colleges of Westminster, Eton, or Winchester; or to any cathedral or collegiate church; or to any city or town corporate, or to any the lands or tenements given to the uses aforesaid, within any such city or town corporate, where there is a special governor or governors appointed to govern or direct the same; or to any college, hospital, or free-school *which have special visitors*, governors, or overseers appointed by their founders. § 2, 3.

Provided also, that this shall not be prejudicial to the jurisdiction or power of the ordinary; but that he may lawfully in every case execute and perform the same, as though this act had not been made. § 4.

Provided also, that no person who shall have any of the said lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stocks of money, in his hands or possession, or shall pretend any title thereunto, shall be named a commissioner or a juror for any the causes aforesaid, or being named shall execute or serve in the same. § 5.

And provided also, that no person who shall purchase or obtain, upon valuable consideration of money or land, any estate or interest in any lands, tenements, rents, annuities, hereditaments, goods or chattels, appointed to any the charitable uses above-mentioned, without fraud or covin, having no notice of the same charitable uses, shall be impeached by any decrees or orders of the commissioners above-mentioned, for or concerning the same his estate or interest; and yet nevertheless, the said commis- [313]

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sioners, or any four of them, shall and may make decrees and orders for recompence to be made by any person, who being put in trust, or having notice of the charitable uses above mentioned, shall break the same trust, or defraud the same uses, by any conveyance, gift, grant, lease, demise, release, or conversion, and against his heirs, executors, or administrators, or any of them, having assets in law or equity, so far as the same assets will extend. § 6.

Provided always, that this act shall not extend to give power, or authority to the commissioners, to make any orders, judgments, or decrees concerning any manors, lands, tenements, or other hereditaments, assured or come under the queen, or to king Henry the eighth, king Edward the sixth, or queen Mary, by act of parliament, surrender, exchange, relinquishment, escheat, attainder, conveyance, or otherwise; and yet nevertheless, if any such manors, lands, tenements, or hereditaments, or any estate, rent, or profit out of the same, have been appointed to any of the charitable uses before expressed, at any time since the beginning of her majesty's reign, that then the said commissioners or any four or more of them may make orders, judgments, and decrees concerning the same, according to the purport and meaning of this act as before is mentioned, the said last mentioned proviso notwithstanding. § 7.

And all orders, judgments, and decrees, of the said commissioners, or of any four or more of them, shall be certified under their seals into the court of the chancery of England, or the court of the chancery within the county palatine of Lancaster respectively, within such convenient time as shall be limited in the said commission: And the said lord chancellor or lord keeper, and the said chancellor of the duchy, shall take such order for the due execution thereof, as to them shall seem fit and convenient. § 8, 9.

And if after any such certificate made, any person shall find himself grieved with any of the said orders, judgments, or decrees; he may complain to the said lord chancellor or lord keeper, or chancellor of the duchy, respectively, for redress therein: who may upon such complaint, by such course as to their wisdoms shall seem meetest, the circumstances of the case considered, proceed to the examination, hearing, and determining thereof; and *upon hearing thereof* may annul, diminish, alter, or enlarge the said orders, judgments, and decrees, as to them shall be thought to stand with equity and good conscience, *according*
[314] *to the true intent and meaning of the donors and founders thereof*; and tax and award good *costs* of suit, by their discretions, *against such persons as they shall find to complain* unto them *without just* and sufficient *cause*, of the said orders, judgments, and decrees. § 10.

§ 1. *Some for relief, &c.*] Money was given to maintain a

preaching minister: this is not a charitable use named in the statute. Yet by the lord keeper and two judges it was decreed to be good, and the use a charitable use within the equity of the statute; and the executor was ordered accordingly to pay the money for the maintenance of it. *Duke's Char. Us.* 82.

Schools of learning] A school, unless it be a free-school, is not a charity within the provision of this act; and consequently, the inhabitants have not a right to sue in the name of the attorney-general. *2 Vern.* 387. *Vin.* tit. *Charit. Uses.*

To the bishop of every several diocese respectively] It was resolved in the 44 *El.* by *Egerton*, *Popham*, *Anderson*, and *Coke* attorney-general, that the see being full at the time of sealing the commission, if the bishop is not named commissioner, the commission is void; but if he be named, it is not requisite that he be present at the execution, for that none is of the quorum; but any four or more may execute the same, without the presence of the bishop or his chancellor. *Duke*, 62, 63.

In case there shall be any bishop] It was resolved in the last mentioned case, that if the see of the bishop be void at the sealing of the commission, then the bishop need not to be named a commissioner, neither his chancellor. Or if the bishop be named a commissioner, and die before the certificate returned; this doth not avoid the commission, but the other commissioners may proceed. *Duke*, 63.

As well by the oaths of twelve lawful men or more of the county] That is (as was resolved in the case of *The School of Rugby*), of that county where the lands do lie, and not where the charity ought to be employed, in case the counties are different. But five years after, to wit, in the 9 *C.* 1. it was further resolved, in the case of *East Grinsted*, that if a rent be granted out of lands in several counties, for maintenance of charitable uses in one county; the commissioners in that county where the charitable use is to be performed may make a decree to charge the lands in other counties with an equal contribution to the payment of the said rent, and that there need not several inquisitions in each county, for that the rent is an intire grant, by the deed or will. *Duke*, 64. 80.

As by all other good and lawful ways and means] Such as former inquisitions, witnesses, rentals, accounts, estreats, and the like, and also their own proper knowledge; by which means they may supply the defects of the inquisition, in matters of particularity and circumstances. *Duke*, 150. [315]

Of all and singular such gifts, limitations, assignments, and appointments] It hath been often resolved, that this statute doth supply all the *defects* of assurances, where the donor is of a capacity to dispose, and hath such an estate as is any way disposable by him: as if a copyholder disposeth of copyhold lands to a

charitable use without a surrender, or tenants in tail convey land to a charitable use without a fine, or if a reversion be granted without attornment or inrollment, or if in the deed by which the charitable uses were first created and raised there be misnamings; in these, and other like cases, the defects are supplied by this statute, because the donor had a disposing power of the estate, and these are good limitations and appointments within the present statute. *Duke*, 84, 85.

Thus lands were given to the *churchwardens* of a parish, to a charitable use; though the devise was void in law, yet decreed good in chancery, by the words *limited and appointed* within the statute. *Duke*, 115.

But a *parol* devise to a charity out of lands, being defective as a will, cannot be supported as an appointment; because being defective as a will, which was the manner of conveyance the testator intended to pass it by, it can have no effect as an *appointment*, which he did not intend: and of this opinion the lord chancellor seemed to be, and decreed accordingly in the principal case. *Prec. Ch.* 391.

Upon calling the parties interested] It was resolved in the said case of *East Grinsted*, that though the commissioners make a decree without giving such notice to the parties, it is good; and if the parties upon their appeal do take exception that they had not any notice, such defect shall not avoid the decree, unless they shew (to the satisfaction of the lord chancellor) that thereby they really lost the benefit of exception to some commissioner, or challenge to some juror; the intent of such notice being, that they make their lawful exceptions and challenges. *Duke*, 121.

§ 2, 3. *Which have special visitors*] In the case of *Morpeth* in *Northumberland*, in the 5 *Cha.* 1., and after that in the case of *Sutton Colfield*, in the county of *Warwick*, in the 11 *Cha.* 1., it was resolved, that the meaning of this clause is, where the land
[316] is given to persons in trust to perform a charitable use, and the donor hath appointed special visitors to see that the trustees perform the use according to his intent; in which case, if the trustees defraud the trust, the commissioners cannot meddle, but the visitors are to perform it. But where the visitors are trustees also, there the commissioners may, by their decree, reform the abuse of the charity; for otherwise, such breach of trust would escape unpunished, unless in chancery or in parliament, which would be a tedious and chargeable suit for poor persons. *Duke*, 68, 69. (*p*)

(*p*) In the case of *Kirkby Ravensworth Hospital*, where the founder had constituted the bishop of Chester as visitor in *particular* cases, and the dean and chapter of York in others, but had given no *general*

§ 10. *Hearing and determining thereof*] It was resolved in [*Windsor* v. *Farnham*, (*Inhabs.*)] 2 *C.* 1. that such determination once made may not be re-examined upon a bill of review, as is usual in other cases in chancery; but that here the decree is conclusive, because it takes its authority by the act of parliament, which mentions but one examination; and it is not like the case, where the chancellor makes a decree by his ordinary authority. *Cro. Car.* 40. [*Seal* v. *Wilson*, 2 *Vern.* 118.]

But in the year 1643, it was resolved by the judges and king's council, assistants in the house of peers, that in such case the party grieved may petition the king in parliament, and have his complaint examined there; and so the decree may be confirmed, altered, or annulled; and then be final. All which was actually done, in the foresaid year, and pursuant to the foresaid resolution, on occasion of a decree of the lord keeper Coventry, in the case of *East Ham* in *Essex*. *Duke*, 62. [And see *Corporation of Burford* v. *Lenthal*, 9 May 1743. 3 *Bla. Com.* 428. *acc.*]

According to the true intent and meaning of the donors and founders] *E.* 10. *G.* 2. *Attorney General* and *Stephens*. The case was, Dr. Ratcliffe, the late physician, by will devised 300*l.* a year to two persons, to be chosen by the archbishop of Canterbury and certain other trustees, out of University college in Oxford; which sum he ordered to be paid to them for ten years for their maintenance, five years whereof they were to spend in England in the study of physic, and the other five abroad. The defendant was one so chosen, and studied here according to the directions of the will, and for that time he received his five years' salary; but afterwards did not go abroad, on account of his ill state of health; and thereupon in the year 1730 resigned to the trustees, who accepted his resignation, and chose another in his room; and in the year 1735 the present information was exhibited against the defendant, that he might account for the five years' salary by him thus received. For the defendant it was argued, that in a late case which came before [317] the house of lords, between *Gaudy* and *Anstis*, upon an appeal, their lordships were of opinion that the word *maintenance* included education; and, therefore, though that word was used in the present will, *education* must be intended by it as implied; and when the defendant had spent half of his time in his education here in England, and was prevented by ill health from going abroad, and

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power to correct abuses, it was held not to exclude the power of the court of chancery to appoint commissioners. 8 *East's Rep.* 221. [15 *Ves.* 305.] But where a visitor is appointed, in consequence of which a commission of charitable uses would not issue, the court of chancery will interfere to correct abuses. *Atto. Gen.* v. *Dixie*, 13 *Ves.* 519.

thereupon had resigned, and his resignation had been accepted, and another chosen in his stead, it was submitted that the present bill must be thought an unreasonable one. And the lord chancellor was of that opinion, and dismissed the information. 2 *Jur. Eccl.* 157.

Costs . . . . against such persons as they shall find to complain without just cause] But this order being given and limited by act of parliament, no costs (if the order, judgment, or decree, be annulled, diminished, or enlarged) ought to be given by the lord chancellor to the party complaining. 2 *Inst.* 712.

But in the case of the corporation of *Burford* against *Lenthal* and others, May 9, 1743; the lord chancellor Hardwicke, on consideration of precedents, allowed costs to the exceptance upon those exceptions in which they had prevailed, and to the respondents upon the exceptions in which the respondents had prevailed; and this, he said, the courts of equity had always done, not from any authority, but from confidence and honest discretion, as to the satisfaction on one side or other on account of vexation. 2 *Atkyns*, 552.

But there is no power to the commissioners to award costs: As in the case of *Humphrey Wharton*, esquire, against *Charles* and others in behalf of *The Poor of Warcup and Bletarn* in the county of *Westmorland, H.* 25 *C.* 2. There being an annuity of 3*l.* 6*s.* 6*d.* issuing out of a close called Meadow Powes in Kirkby Thore, in the said county, to several charitable uses, which close was purchased by the said Humphrey Wharton; the commissioners for charitable uses decreed, that the said Humphrey should pay the arrears of the said charity, and also 6*l.* 13*s.* 4*d.* costs. Humphrey excepted to the money for costs, as not within the power of the commissioners to decree; and by the lord chancellor the said decree, as to so much thereof as concerned the said costs was reversed. *Cha. Ca. Finch.* 81. (*q*)

[By *st.* 35 *G.* 3. *c.* 111. § 2. The governors or members of any institution for *relief of widows, orphans, and families of the clergy and others in distressed circumstances*, were empowered to frame rules for management of their funds, and to amend and alter the same, and to make new ones; and procure the same to be presented to the justices at any time before or immediately after Michaelmas sessions, 1796, and to be registered, under and subject to the same conditions as *friendly societies* established under 33 *G.* 3. *c.* 54.

(*q*) In a late case, an heir at law being brought by order before the court in a charity cause, and having established his title, he was decreed his costs, though it was decided that there was no resulting trust in his favour. *Att. Gen.* v. *Haberdashers' Company and Tonna*, 4 *Br. C. C.* 178. 103. and 1 *Br. C. C.* 9. 2 *Ves. jun.* 1.

And by § 3. The governors or members of any such institution, whose rules are so confirmed and registered, may appoint a treasurer, who shall give security as by 33 G. 3. c. 54. § 4. directed, and who shall account for their funds, and the same shall be vested in him; and all the powers, rules, conditions, &c. in that act contained, as to appointment of treasurers, for taking security, and for protecting, securing, or recovering their funds, shall extend to such institutions, and the same shall be enjoyed and put in execution accordingly. See *Tyrwh.* and *Tynd. Statute Digest*, tit. *Friendly Societies.*

By 52 *G.* 3. *c.* 102. intituled, "*An act for registering and securing of charitable donations*," it is provided, § 1. That a memorial or statement of the real and personal estate, gross annual income and investment, and the general and particular objects of every charity and charitable donation for benefit of any poor or other person in England or Wales, founded, benefited, increased, or secured, with the names of the founders or benefactors where known; and also of the person in whose custody the deeds, wills, and other instruments whereby such charities have been founded, &c. may be; and also of the then trustees, feoffees, or possessors of such real or personal estate, shall, within six months from *9th July*, 1812, be registered by the latter, or some or one of them, as in *schedule* of the act, in the office of the clerk of the peace of the county, or city, or town, if a county of itself, within which such poor or other person is: which memorial, signed by the person registering the same, shall be left in the office of the clerk of the peace, who shall forthwith transmit a copy to the enrolment office of chancery.

A like memorial shall be registered, left, and transmitted within twelve months after the decease of any person who shall found, &c. (as in § 1.) any charity, &c. by deed or will, § 2.

All clerks of the peace in England and Wales shall, as occasion requires, provide proper books of parchment or vellum for entry of such registers therein, and every such original, memorial, and book so provided, shall be carefully preserved for public use and inspection in the office to which it belongs, with a correct index of such charities, distinguishing each by the name of its founder, or by its most general appellation, § 3.

Where the persons to be benefited shall not be wholly within one county, then the clerk of the peace of the county where the charity is registered shall forthwith notify in the London Gazette, the name and title thereof as entered in such index, the names of the places wherein the objects of the charity are, its particular or general objects, and the name of the county where the memorial is registered, § 4.

If such donations are not duly registered (as in § 1.), any two persons interested in the charity may petition the lord chancellor,

master of the rolls, or court of exchequer, who shall summarily hear the same, and on affidavits or other evidence, shall make such order therein, and as to the costs of the application and proceedings, as seems fit, § 5.

No proceedings under these provisions shall decide any title as to the property registered, or persons interested therein, § 6.

Every clerk of the peace shall, when required, make searches and give copies of the memorials hereby directed to be entered in his office, to any person tendering the proper fee, (as in § 8.) § 7.

He shall have four shillings for registering such memorial if it does not exceed four hundred words; if exceeding that number, one shilling *per* hundred words in the entry, and like fees for every copy of any entry given out of such register; and he shall have the costs of every notification in the London Gazette (as in § 4.), with the further sum of ten shillings for drawing and inserting the same, and transmitting the copy to the enrolment-office, (as in § 1.) § 8.

Where any difficulty occurs in preparing such statements, the quarter sessions may, on motion to them and examination of the circumstances, grant more time for the purpose, not exceeding six calendar months, § 9.

The quarter sessions may allow to the person registering such memorial the reasonable costs of preparing, registering, notifying, and transmitting the same, with reference to the income of the charity, and the sums so allowed may be deducted by such persons from the funds in their hands; but no such costs shall be allowed unless stated to the quarter sessions on the declaration in writing of the applicant, signed by him, that such statement is true, and contains, to the best of his belief, a true account of all the property and objects of the charity, the names of its benefactors, and of the persons having the custody of the title-deeds, and of the feoffees, trustees, &c. (as in § 1.) of the charity property, § 10.

These provisions do not extend to charitable donations, not secured on lands, or directed to be so secured, or permanently invested in government, or public stocks, or securities, nor to any charitable donation, which, by the donor's direction, or by lawful rules of the institution, may be wholly or in part expended in the charitable purposes for which it is given, at discretion of the governors or trustees of any charitable institution, *ibid.*

This act does not extend to any hospital, school, or charitable institution, founded, improved, or regulated by his majesty, or any of his predecessors, or of any special act particularly relating thereto; or to any charitable donation under superintendance of any such royal hospital, or to the governors of the corporation for relief of poor widows and children of clergymen, nor to any friendly society, the rules of which are legally confirmed, nor to

either of the English universities, their colleges, or halls, nor to charitable gifts or foundations under their control, nor to the Radcliffe infirmary in Oxford, nor to Westminster, Eton, or Winchester colleges, the charter-house, the cathedrals, or collegiate churches in England and Wales, the Trinity-house of Deptford Strond, nor to funds applicable to charitable purposes for benefit of any Jews, § 11.

Nor to charitable institutions of quakers under superintendance of quakers, § 12.

Nor to charitable foundations, the accounts of which are directed to be annually passed in the court of chancery, nor to any charity or charitable foundation, not exceeding forty shillings in annual gross income, and of which the trustees, feoffees, or possessors shall, in six months from this act passed, deposit in the hands of the minister of the parish a statement in writing, as in the schedule, to be deposited by him in the parish chest, § 13. (*See the like* and other exceptions in 43 *El. c.* 4. § 2., 58 *G.* 3. *c.* 91. § 12., and 59 *G.* 3. *c.* 81. § 7., from the commissions by those acts appointed.)

Where any corporation, guild, or fraternity, are entrusted with the distribution of divers charities, or of the rents and profits thereof, they may be stated in one memorial, § 14.

Saving to his majesty, and all other persons, their powers of superintending and regulating charities, and the property and funds thereof, as before this act, § 15.

For appointing commissioners to enquire concerning charities in England for education of the poor, 58 *G.* 3. *c.* 91. (Public *clause*, *id.* § 16., amended and extended to other charities in England and Wales, 59 *G.* 3. *c.* 81. Both expired at end of the session next after 1st August, 1823 (§ 15.), and amended by 59 *G.* 3. *c.* 91. § 4.)

58 *G.* 3. *c.* 91. and 59 *G.* 3. *c.* 81. shall be construed together as one act, so far as they are consistent with each other, 59 *G.* 3. *c.* 81. § 10.

His majesty may appoint, under the great seal, any number of commissioners not exceeding twenty, (fourteen only were required by 58 *G.* 3. *c.* 91. § 1.) for the purposes of these acts; and they, or any two of them, (three were required, *ibid.*) shall have power to investigate the amount, nature, and application of all estates and funds soever, and their produce, destined or intended to be applied for education of the poor in England and Wales, (or to the support of any charity, or to charitable donations for benefit of poor persons, or held under trusts created for any charitable uses or purposes soever, except as in § 7, 8. excepted, 59 *G.* 3. *c.* 81. § 5.), and to investigate all breaches of trust, abuses, or misconduct in the management or appropriation of such estates and funds, and they (or any five or more of them, 59 *G.* 3. *c.* 81. § 1.) shall report and certify their proceedings to

his majesty (the report to both houses of parliament required by 58 G. 3. c. 91. § 1. is repealed by 59 G. 3. c. 81. § 2.) half-yearly in writing, under their hands and seals, specifying the amount, management, and appropriation of the estates and funds enquired into by them, the nature thereof respectively, their actual annual produce and value, and who are tenants in possession of the estates; adding observations on the best methods of recovering any part of such estates or funds which has been misapplied, or omitted to be applied in pursuance of the trusts created in respect thereof, and of securing such estates, &c. and their produce against future misapplication, 58 G. 3. c. 91. § 1., 59 G. 3. c. 81. § 1. and § 5.

Commissioners may employ one secretary, five clerks, five messengers, and two other officers, and appoint their salaries, 59 G. 3. c. 81. § 1., 58 G. 3. c. 91. § 4.

If, on such enquiry, (as in § 1.) it appears that from any cause soever, it has become impossible to apply the estates or funds to the purposes destined, the commissioners shall report the special circumstances, 58 G. 3. c. 91. § 2.

The commissioners shall not be obliged to report their proceedings to either house of parliament, 59 G. 3. c. 81. § 2.

They shall take an oath of office before chancellor of exchequer or master of rolls, for faithful exercise of their duty, 58 G. 3. c. 91. § 3.

His majesty may fill up all vacancies among the commissioners, § 11., 59 G. 3. c. 81. § 3.

The treasury may, from time to time, issue out of the consolidated fund, any sum not exceeding 10,000*l.* in one year, for payment of salaries to any number of commissioners, not exceeding ten, and not members of either house of parliament; out of which sum a salary of 1000*l.* a-year shall be paid to each of them half-yearly, free and clear from all taxes, on 10th October and 5th April; and in case of resignation or death, the commissioners so resigning, or the executors or administrators of such commissioners so dying, shall be entitled to the proportional part accrued during the time that such commissioner has executed his office; and the treasury in like manner may issue any further sums not exceeding 8000*l.* in one year, for payment of the travelling expences of any of the commissioners, and of the secretary, clerks, messengers, and officers, and in paying other necessary charges, as appointed in writing by the commissioners, to be accounted for by the persons to whom the money is paid, 58 G. 3. c. 91. § 4., 59 G. 3. c. 81. § 4.

The commissioners, or any two of them by direction of the rest, shall, from time to time, meet, and with or without adjournment hold their sittings in Westminster, or any other place in England and Wales, most convenient for the purposes of these

acts, and may require, by precept under their hands and seals, any person acting as a trustee of such estates or funds, or concerned in the management, payment, or receipt of any part thereof, to render a true account of all that relates to the estates or funds under their trust or management, or on account of which they have acted in making or receiving payments, and may, by like precept, summon any persons to attend them at any place not more than ten miles from their place of abode, and to bring with them any deed, &c. or other document in their custody (or true copies of any parts thereof, 59 *G.* 3. *c.* 91. § 4.) relating to such funds, or their produce, and to the receipt or non or misapplication thereof, and such persons shall punctually attend on being paid their just and reasonable expences, 58 *G.* 3. *c.* 91. § 5. & § 9., 59 *G.* 3. *c.* 91. § 4.

Every person summoned to appear before any two or more such commissioners, who shall wilfully omit to appear, or to produce any deed or document in his possession, which he is required by their precept to produce, relating wholly to such estates or funds, or to the receipt, mis or nonapplication thereof, or to the state of the schools or charities then the subject of enquiry, or to produce the true copy of any part of any such deed, &c. or who shall refuse to be sworn, or to affirm, or being sworn, or having affirmed, shall refuse to answer, or answer fully, any lawful question concerning such estates or funds, or the state of such schools and charities (except those exempted by 58 *G.* 3. *c.* 91.), shall pay such fine as the king's bench or exchequer shall impose, on application on behalf of the commissioners, payment of which may be enforced by attachment, as in cases of contempt, 59 *G.* 3. *c.* 91. § 4.

Every two (see 59 *G.* 3. *c.* 91. § 1.) commissioners so authorised, shall cause all examinations taken before them, and all papers and documents, parts thereof, to be from time to time transmitted to the secretary of the commissioners at their office in Westminster, 58 *G.* 3. *c.* 91. § 9.

Bonâ fide purchasers of any lands, hereditaments, or estates, without notice that the same were given or limited, &c. to any charitable use, shall not be bound after declaring the same to make further answer to commissioners' interrogatory, nor to produce to them any deed or document relating to his estate therein, § 6.

The commissioners may examine on oath or affirmation, all persons summoned before them, touching all things necessary for the execution of the powers vested in them, § 7.

No mortgagee, trustee, agent, solicitor, or attorney shall be compellable to produce any document, of which he has charge as such, or to give evidence as to its contents, without notice first given to the mortgager, cestuique trust, or principal, and the lat-

ter being first examined touching the same before the commissioners; and if such mortgagor, &c. is exempted from producing such document, the mortgagee, &c. shall not be required to produce the same, or give evidence of its contents; and no person shall be compelled to answer any question, or produce any document, where the answer or production shall tend to criminate or expose him to penalties, § 8.

Every person wilfully giving false evidence on such oath or affirmation (as in § 7.), is subject to the penalties of perjury, § 10.

No provisions in these acts extend to the universities of Oxford or Cambridge, or to any college or hall therein, or to any schools or endowments of which they are trustees, or to the colleges of Westminster, Eton, or Winchester, or to the Charter House, Harrow, or Rugby schools, or to any cathedral or collegiate church within England or Wales, nor to the Trinity House, corporation of Deptford Strond, nor to any college, free school, or other charitable institution, or charity whatever, having special visitors, governors, or overseers appointed by the founders, nor to any funds applicable to the benefit of Jews, Quakers, or of Catholics, and being under the superintendance and control of persons of such persuasions: but the commissioners shall report to his majesty (and both houses) the names of the charities which have such special visitors, 58 G. 3. c. 91. § 12., 59 G. 3. c. 81. § 7. (See the like and other exceptions in 43 El. c. 4. § 2., 52 G. 3. c. 102. § 10. to § 13.)

Nor to any establishment or society for charitable purposes wholly or principally maintained by voluntary contributions, and under the control of any committee or governors, or other persons appointed out of or by voluntary subscribers thereto; nor to empower the commissioners to interfere with the application of any donation or bequest to the general purposes of such an establishment, in aid of such voluntary contributions; but the management and application of the rents of any lands or hereditaments belonging to such institution for twenty years before passing this act, shall be subject to their examination at their discretion, 59 G. 3. c. 81. § 8.

No petition or information presented, filed, or prosecuted under this act, nor any answer thereto, nor any depositions, interrogatories, affidavits, or proceedings, nor any order or decrees on the same, or in relation thereto, nor any copies of any proceedings hereunder this act, shall be liable to stamp duty; nor shall copies of, or extracts from wills, relating to such charities, required by an order signed by two commissioners, for the purposes of these acts, from the office of the prerogative court of the archbishop of Canterbury, in Doctors Commons, or from other offices where the will has been proved, or copies of, or extracts from any deeds so required, be charged with stamp duty, § 9.

Proviso for the acts of commissioners and their agents, heretofore done in execution of 58 G. 3. c. 91. *id.* § 9.

Actions brought against any such commissioners or their agents, for any thing done by them in pursuance of these acts, shall be commenced in six calendar months after the cause of action accrued: defendant may plead the general issue, and give both acts and the special matter in evidence; and if such actions are brought after the time limited, the jury shall find for defendant; and in that case, or if they find a verdict for defendant on the merits, or if plaintiff discontinue after appearance, is nonsuited, or has judgment against him on demurrer, defendant shall have treble costs, 59 *G.* 3. *c.* 81. § 11., 58 *G.* 3. *c.* 91. § 3.

By 52 *G.* 3. *c.* 101. (Sir *Samuel Romilly*'s act) intituled, "*An act to provide a summary remedy in cases of abuses of trusts created for charitable purposes,*" it is provided, That in every case of breach or supposed breach of any trust created for charitable purposes, or whenever the direction of a court of equity is deemed necessary for administration thereof, any *two or more persons* (2) may present a petition to the lord chancellor or master of the rolls or court of exchequer, stating such complaint, and praying such relief as the case may require, which petition shall be heard in a summary way, and determined on affidavits or other evidence produced on such hearing, and such order shall be made therein, and with respect to the costs of such applications, as seems just: to be final, unless the party grieved shall, within two years from the time when such order has been passed and entered by the proper officer, have preferred an appeal from such decision to the house of lords, to whom it is hereby declared that appeal shall lie from such order, § 1.

Every petition so to be preferred shall be signed by the persons preferring it in the presence of their solicitor, and shall be attested by him, and shall be submitted to and allowed by the attorney or solicitor-general, which allowance shall be certified by him before presenting such petition, § 2.

No petitions or proceedings thereon, or relative thereto, nor copies thereof, shall be liable to stamp duty, § 3.

A petition under 52 *G.* 3. *c.* 101. must have the signature of the attorney general, or of the solicitor-general (if there is no attorney-general), to be affixed with the same deliberation as in case of an information regularly filed. *Ex parte Skinner In re Lawford Charity*, 2 *Merivale*, 453. *Attorney-general* v. *Green*, 1 *J. & W.* 303. For that statute was only meant to extend to cases of plain breach of trust by the trustees themselves, and not to benefits derived therefrom by third persons. Therefore where

(2) Having a direct interest in the charity. *Bedford Charity* case, 2 *Swanst. Rep.* 518. 525, 526.

an information has been filed, the court will not, on a petition having the same objects, separate them, and give relief on the petition as to those which are regularly within its limits, leaving the rest to be disposed of on the information: and it was also held, that where a tenant of a charity estate has acted fairly, he shall not be turned out of possession, or have his lease set aside merely on the ground of the inadequacy of his rent to the value of the estate. *Ex parte Skinner, ubi supra.*

The petition further prayed, that an account of the receipts and payments of the deceased trustee might be taken, and that his representative and the tenant might be charged with the full value of the estate, from the date of the agreement therein mentioned; but this was held not within the act, the lord chancellor saying, that it might be doubtful whether a petition, seeking a variation of a lease, would be within the act, but that one which prays an account of the effects of a deceased trustee could clearly never be within it. S.C. 1 *Wils. Ch. Rep.* 14. In another case, where an information including all the objects of a petition was going on after the filing of a petition, including many of the same objects, the court directed it to be referred to the attorney-general, to certify whether the information or petition should be proceeded with. *Attorney-general* v. *Green*, 1 *J. & W. Rep.* 303. This act does not confine the jurisdiction of the court to petitions only in the first instance, but subsequent orders may be made therein on motion, *In re Slewring's Charity*, 3 *Meriv.* 78. *Appx.* Where the trustees did not appear to a petition presented under this act, they were ordered to shew cause why the prayer should not be granted. *Ex parte Seagears*, 1 *Ves. & B.* 496. This statute, which substitutes petition for information, is limited to questions of abuse of trust, as between the trustees and objects of the charity, and is not applicable to an adverse claim to land as having formerly belonged to the charity; and stat. 39 & 40 *G.* 3. *c.* 56. as to money entailed, is discretionary. *Ex parte Rees*, 3 *Ves. & B.* 10.; and see *Ex parte Stern*, 6 *Ves.* 156. Constructive trusts are not within the act. *Ex parte Brown*, *Coop. Ch. C.* 295. A trust for benefit of a charity is broken by pulling down a chapel, selling the materials, and converting the burial ground to other uses; and the court directed a conveyance to new trustees on petition under this act. *Ex parte Greenhouse*, 1 *Madd.* 92. The master, on reference of a petition under this act, may proceed on evidence by affidavits. *Ex parte Greenhouse*, 1 *Swanst.* 60. 1 *Wils.* (Ch.) 18.

By stat. 59 *G.* 3. *c.* 91., intituled, "*An act for giving additional facilities to courts of equity regarding the management of estates or funds belonging to charities*," when it appears to the commissioners, appointed under 58 *G.* 3. *c.* 91. and 59 *G.* 3. *c.* 81., that the directions of a court of equity are requisite for remedying any neglect or abuse in the management of any trust

created for charitable purposes, or of the estates or funds thereto belonging, or for regulating the administration thereof, any five or more of them may certify the particulars of the case, in writing signed by them, to the attorney-general, who may apply summarily, in the nature of a petition, or commence a suit by information to or in the court of chancery or exchequer, sitting in equity, setting forth the neglect or abuse, and praying relief; and the decrees of the exchequer, made according to the course of the court, shall be final, except on appeal to the lords within one year; and when such petition is made in chancery, the lord chancellor may direct the master of the rolls or vice-chancellor to hear the same, subject to his reversal of their decrees, which shall not be enrolled till signed by him, § 1. (*See the old* regulation, 52 *G.* 3. *c.* 101. § 1.)

When any appeal is made to the lord chancellor, from any order or decree of the master of the rolls or vice-chancellor in such petition, the decree made thereon by the lord chancellor shall be final, without appeal to the lords, § 2. (*virtually* repealing, as to appeal from the chancellor, 52 *G.* 3. *c.* 101. § 1.)

No petition or information presented or prosecuted under this act, nor any answer thereto, nor any depositions, interrogatories, affidavits, or proceedings, nor orders or decrees thereon, nor copies thereof, shall be liable to payment of stamp-duties, § 3., 52 *G.* 3. *c.* 101. § 3.

Where it appears to the trustees of any free-school, hospital, or other charitable institution or donation within this act, that the statutes or regulations thereof are insufficient for due administration of the funds thereof, such number of them as by their regulations may do any act, may, with consent of any five or more commissioners, present a petition to the lord chancellor, or to the court of exchequer sitting in equity, praying relief; and the order given by either court shall be final, unless an appeal to the house of lords is entered in two years after the order made, 59 *G.* 3. *c.* 91. § 5.

By 1 & 2 *G.* 4. c. 92. Lands subjected to charitable trusts may be exchanged for other lands by commissioners appointed for that purpose by the bishop of the diocese. The provisions of this act are too long for insertion in this place.]

Charity Briefs. See **Briefs.** [318]

Charles the first's Martyrdom. See **Holidays.**

Charles the second's Restoration. See **Holidays.**

Chasible. See **Casula.**

Chest for alms. See **Church.**

Child-birth.

1. *EDMUND.* If a woman die in child-birth, and this shall well appear, she shall be cut open, if it be believed that the child is living; but let them take care that the woman's mouth be kept open. *Lind.* 307.

That is, with a piece of wood, or key, or any other thing, so that the air may enter, that the child be not suffocated for want of respiration. *Lind.* 307.

2. *Edmund.* Women shall be often admonished, to nurse their children cautiously, and not lay the children close to them in the night, that they be not overlaid: and that they leave them not alone by the water-side. *Lind.* 307.

3. *Rubrick* before the office for the churching of women. The woman at the usual time after her delivery shall come into the church *decently apparelled*, and there shall kneel down in some convenient place, as hath been accustomed, or as the ordinary shall direct.

Decently apparelled] In the reign of king James the first, an order was made by the chancellor of *Norwich*, that every woman who came to be churched should come covered with a white veil: a woman refusing to conform was excommunicated for contempt, and prayed a prohibition; alleging that such order was not warranted by any custom or canon of the church of England. The judges desired the opinion of the archbishop of Canterbury; who convened divers bishops to consult thereupon:
[319] and they certifying, that it was the antient usage of the church of England, for women who came to be churched to come veiled, a prohibition was denied. *Palm.* 296.

4. *Rubrick* at the end of the office for churching of women. The woman that cometh to give her thanks must offer *accustomed offerings;* and if there be a communion, it is convenient that she receive the holy communion.

Accustomed offerings] *E.* 2 *G.* 2. *Naylor* and *Scott.* A libel was in the consistory court of York, founded upon a custom, that every one keeping house, and having children in the parish, should pay 10*d.* a child to the parson, at the time the wife is or ought to be churched. The counsel apprehended it to be an unreasonable custom, that the parson should have money for doing of nothing, and so moved for a prohibition; for they said the proper way was, if the wife would not be churched at the proper time, to force her to it by ecclesiastical censures. Afterwards the custom being denied, the same was tried on a prohibition, and a verdict given for the custom. Then it was moved in arrest of judgment; 1. That the custom is unreasonable in itself: and, 2. That it is uncertainly set forth. To the first it was answered, that religion requires a woman should return thanks to God in a

public manner, for so great a deliverance; and therefore it is but fit that he who assists her in such office should have some requital. To the second, it was said, that there are other cases where the temporal courts allow the ecclesiastical courts to set forth matters equally uncertain as in the present case, even upon libels on customs, and have not granted prohibitions; as where a libel was upon a custom, that the farmers of such a farm have always laid out 8s. *or thereabouts* for cakes and ale in the perambulation, and yet held to be sufficiently set forth [(but see vol. iii. p. 63.)]; and besides, it was said if the court was in doubt, whether the proceedings in the courts below were usually in so uncertain a manner, the proper method would be to write to them to certify how their proceedings are there: to this purpose was cited the (aforesaid) case, where a libel was for a woman not coming to be churched in a veil; whereupon a prohibition being moved for, the court wrote to the archbishop to certify how the canons in that case were, and he certified the canon to require it. It was observed further, that though indeed the woman's fitness to be churched is unknown to the temporal courts, yet to the ecclesiastical courts it is well known, and therefore they might well have proceeded upon it below. The canon law says, [320] that a month is a reasonable time for women's coming to be churched after their deliverance, unless in case of great weakness; and that standard is the proper one to regulate this custom by; and therefore the court below ought to be allowed to go on in their proceedings. But by the court: We are not to consider the methods by which this fee may be ascertained, but only that it is not certain as it stands upon the libel; and therefore upon the libel we ought not to suffer them to proceed. And they said the proper method in this case would have been, for the plaintiff to set forth in the libel the proper time when women are usually fit to be churched, and then to have averred that the defendant's wife was not churched within that time. And upon the whole matter judgment was arrested. *L. Raym.* 1558. 1 *Barnard.* 159.

Chorepiscopi.

CHOREPISCOPI, *local* bishops, in the ancient church, were persons delegated by the bishop to exercise episcopal jurisdiction within certain districts.

Chrisme.

CHRISME, was the holy oil, with which heretofore all infants baptized were anointed: this was made by the bishops; and, by a constitution of archbishop Peckham, was to be renewed once every year. (8)

Chrisome.

CHRISOME, in the office of baptism, was a white vesture which the priest did put upon the child, saying, Take this white vesture for a token of innocency: and so on. *Gibs.* 366.

Christening. See Baptism.

[321]

Church.

I. *Founding of churches.*

THE ancient Saxon word is *cyrce,* the Danish *kircke,* the Belgic *kercke,* the Cimbric *kirkia* or *kurk;* probably from

(8) Mandamus to compel a bishop to give the chrisme was granted. *Rex* v. *Bishop of Exeter, Palmer,* 51.; and see *Rex* v. *Dean and Chapter of Trinity Chapel, Dublin,* 8 *Mod.* 28.

the Greek word Κυριακον, belonging to the Lord, or Κυριου οικος, the Lord's house: so that we have lost the antient pronunciation of the word (except in the northern parts of England, and in Scotland), by softening the letters c or k into *ch*, as we have done in many cases: which letters the antient Greeks and Romans always pronounced hard, as the letter *k*.

Lord *Coke* says, by the common law and general custom of the realm, it was lawful for bishops, earls, and barons, to build churches or chapels within their sees; and hereof king John informed pope Innocent the third (naming only, *honoris causa*, the bishops and baronage of England, albeit this liberty extended to all), with request that this liberty to the baronage might be confirmed. To these letters the pope made this answer, *Quod enim de consuetudine regni Anglorum procedere regia serenitas per suas literas intimavit, ut liceat tam episcopis, quam comitibus et baronibus, ecclesias in feodo suo fundare; laicis quidem principibus id licere nullatenus denegamus, dummodo diocesani episcopi eis suffragetur assensus, et per novam structuram veterum* [322] *ecclesiarum justitia non lædatur* (r). Whereas the baronage had absolute liberty before, now the pope addeth the consent of the bishop; but that addition bound not, seeing it was against the liberty of the baronage warranted by the common law: and he says he would not have rehearsed this epistle, but that it is a proof what the general custom of the realm was, concerning the building of churches by the baronage of England. And albeit they might build churches without the king's licence, yet could they not erect a spiritual politic body to continue in succession, and capable of endowment, without the king's licence: but by the common law, before the statutes of mortmain, they might have endowed this spiritual body once incorporated, *perpetuis futuris temporibus*, without any licence from the king or any other. 3 *Inst.* 201, 202. [*Selden de Dec.* 360.] Which body, so incorporated, is not dissolved, though the church is drowned, or otherwise destroyed; but, in that case, one may be presented to the rectory, and shall be liable to annuities and other charges; the church in consideration of law being properly the *cure of souls* and the *right of tithes*. *Gibs.* 189.

But Dr. *Gibson* observeth on the contrary, that no person may erect a church, without the leave and consent of the bishop. And this, he says, is agreeable to the rules both of the civil and canon law (s), and was made an express law of the church of

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(r) *Epist. Dec. Innocent.* 3. *Lib.* 3. p. 228.

(s) *Nov.* 67. 1. And the 4th canon of the council of Lateran is express, that *no one shall build or erect a monastery or church against the will of the bishop of the city.* See also title Advowson, I. and Chapel, 4. in the notes.

England many years before the reign of king John; viz. in the council of Westminster in the time of king Stephen. Nor could this right of the bishop be defeated by the exemption of religious persons from episcopal jurisdiction; who might not, under colour of such exemptions, erect churches in any part of their possessions not exempt, without leave from the bishop; as we find it specially adjudged in the body of the canon law. And to this the pope's answer to king John is exactly agreeable, *laicis quidem principibus id licere nullatenus denegamus, dummodo diocesani episcopi eis suffragetur assensus.* And king John's letter doth not relate to a right of erecting with or without licence; since the occasion of
[323] it was, the building of a collegiate chapel by the archbishop, who was his own licence: and the only objection was, that the building of it would be prejudicial to the church of Canterbury. *Gibs.* 188.

But it is to be observed, that these two assertions are not contradictory; for the one says only that by the civil and canon law it might not be done, and the other says that it might be done by the common law: although lord *Coke* produceth no instances, before the reign of king John or after, of churches erected without the licence of the diocesan. And it seemeth to amount to the same thing, so long as the bishop hath power (unto which lord *Coke* assenteth) after the church is erected to withhold or deny the consecration.

And not only the bishop, by refusing to consecrate, may hinder the establishment of a new church or chapel in any parish, but also any other person thinking himself injured thereby, as by incroaching upon his ground, stopping his way, or the like, may apply to the temporal courts, who (as they see cause) will grant him redress.

The antient manner of founding churches was, after the founders had made their application to the bishop of the diocese, and had his licence, the bishop or his commissioners set up a cross, and set forth the ground where the church was to be built; and then the founders might proceed in the building of the church: and when the church was finished, the bishop was to consecrate it, but not till it was endowed; and, before, the sacraments were not to be administered in it. *Degge*, *part* 1. *c.* 12.

For albeit churches or chapels may be built by any of the king's subjects, yet before the law take knowledge of them to be churches or chapels, the bishop is to consecrate or dedicate the same: and this is the reason, that a church or not a church, a chapel or not a chapel, shall be tried and certified by the bishop. 3 *Inst.* 203. (4)

(4) *Seld. de Dec.* 85. decreed in a council under Wilfrid, arch-

II. *Consecration and dedication of churches.* (t)

No church till consecration.

1. The law (as was said before) takes no notice of churches or chapels, till they are consecrated by the bishop: but the canon law supposes, that with consent of the bishop, divine service may be performed, and sacraments administered in churches and chapels not consecrated; inasmuch as it provides, [324] that a church shall have the privilege of immunity, in which the divine mysteries are celebrated, although it be not yet consecrated (u); and there are many licences to that effect (granted on special occasions) in our ecclesiastical records. *Gibs.* 190.

No consecration before endowment.

And after a new church is erected, it may not be consecrated, without a competent endowment. And this was made a law of the church of England in the 16th canon of the council of London, *A church shall not be consecrated, until necessary provision be made for the priest.* And the canon law goes further; requiring the endowment, not only to be made before consecration, but even to be ascertained and exhibited before they begin to build. And the civil law is yet more strict; enjoining, that the endowment be actually made before the building be begun. *Gibs.* 189.

Which endowment was commonly made, by an allotment of manse and glebe by the lord of the manor; who thereby became patron of the church. (x) Other persons also, at the time of dedication, often contributed small portions of ground: which is the reason, why in many parishes the glebe is not only distant from the manor, but lies in remote divided parcels. *Ken. Par. Ant.* 222, 223.

Consecration enjoined.

3. It appears by good chronology, that the first who decreed that churches should be consecrated, was *Euginus*, a Greek, and priest of Rome; who was the first that styled himself pope, in the year 154. *God.* 49.

Afterwards the same was inforced in this realm by a consti-

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bishop of Canterbury, A. D. 816. See *Seld.* 261. *c.* 9. § 4. And afterwards by canon, A. D. 1102. No church can be erected without endowment.

(t) *Vide* 2 *Ought*, 249. & *fol.*

(u) *De Cons.* 1. 12. X. 3. 49. 9. This, however, is an exception to the general rule, "that a church is to be consecrated as soon as may be." Another exception obtained in cases of extreme necessity; for if the church was destroyed by fire, the service might be performed in chapels, tents, or in the open air, before the consecrated altar-table. *De Cons.* 1. 30. *Inst. J. C.* 2. 18. [In *Stallwood* v. *Tredger*, 2 *Phillim. Rep.* 292. a church being under repair and shut up, a publication of banns in the church of an adjoining parish was held sufficient, within 26 *G.* 2. *c.* 33. § 1.; the marriage itself being had on the site of the old church. And see provisions of 4 *G.* 4. *c.* 76. tit. Marriage.]

(x) See Advowson. 1.

tution of *Otho*, in this manner: *The dedication of churches is known to have had its beginning under the old testament, and was observed by the holy fathers under the new testament; under which it ought to be done with the greater care and dignity, because that under the old testament were only offered sacrifices of dead animals; but under the new testament is offered for us upon the altar by the hands of the priest, the heavenly living and true sacrifice, the only*
[325] *begotten Son of God. Wherefore the holy fathers provided, that so sublime an office should not be performed (unless in case of necessity) but in places dedicated. Now because we have seen and heard, that so wholesome a mystery is contemned, or at least neglected, by some; having found many churches, and some of them cathedrals, which although they have been built of old time, yet have not as yet been consecrated with the oil of sanctification: Therefore being desirous to remedy so dangerous a neglect, we do decree, that all cathedral, conventual, and parochial churches, which are now built and the walls thereof perfected, be consecrated by the diocesan bishops, or others authorized by them, within two years: and let it be so done within the like time, in all churches hereafter to be built. And to the end that so wholesome a mystery and ordinance may not pass into contempt: if such places be not dedicated within two years from the time of the finishing thereof, they shall be interdicted from the solemnities of the mass, until they be consecrated, unless they be excused for some reasonable cause. Moreover, by the present ordinance we do forbid the abbots and rectors of churches, to pull down antient consecrated churches, under pretence of building larger or more beautiful, without licence and consent of the diocesan: and the diocesan shall diligently consider, whether it be expedient to grant or to deny such licence; and if he shall grant the same, let him take care that the work be finished as soon as may be.* Athon. 7.

Interdicted from the solemnities of the mass] That is, from the solemn or high mass; but not from the common celebration of mass, or other inferior offices. *Athon.* 7.

And also by a constitution of *Othobon*: *The rector or vicar of an unconsecrated church shall apply to the bishop (if it can conveniently be done), otherwise to the archdeacon that he may apply to the bishop, within a year after the building of the church, for the consecration thereof; upon pain that such rector, vicar, or archdeacon making default, shall be suspended from their office till they comply: and the bishop shall exact nothing therefore, but the accustomed procuration.* Athon. 83.

Time of consecration.

4. The consecration of churches may be performed, indifferently, on any day: so it was established by a decretal epistle of pope Innocent the third. (*y*) And according to the calcula-

(*y*) X. 3. 40. 2.

tion of learned men, Constantine's famous dedication of the church at Jerusalem, in a full synod, was on a Saturday, and not on the Sunday. *Gibs.* 189. [326]

And this consecration ought to be in the time of divine service. The gloss upon the canon law maketh a doubt whether this is not of the substance of the consecration; but be that as it will, it is certainly very decent. *Gibs.* 189.

5. The emperor Justinian, in his care of the church, hath prescribed a form of consecration of churches [or rather, of the ground upon which it is to be built] in this manner: his law is, "That none shall presume to erect a church, until the bishop "of the diocese hath been first acquainted therewith, and shall "come and lift up his hands to heaven, and consecrate the "place to God by prayer, and erect the symbol of our salvation, "the venerable and truly precious rood." *God.* 47. (z)

Form of consecration.

In the church of England, every bishop is left to his own discretion, as to the form of consecrating churches and chapels: only by the statute of the 21 *H.* 8. *c.* 13. for limiting the number of chaplains, it is there assigned as one reason why a bishop may retain six chaplains, because he must occupy that number in the consecration of churches.

There was a form drawn up in the convocation, in the year 1661 (occasioned, as some think, by the offence taken at bishop Laud's ceremonious manner of consecrating St. Katherine's Creed-Church in London); but this was not authorised, nor published. *Gibs.* 189. *Johns.* 20.

Which form of bishop Laud's in the aforesaid instance was thus: He came on a Sunday, being the 16th day of January 1630, to the west door of that church; and some persons, who were prepared for that purpose, spoke aloud these words, *Open, open, ye everlasting doors, that the King of glory may enter in.* Immediately the doors were opened, and the bishop and some other doctors entered; then he kneeled, and with eyes lifted up, and his arms spread, he pronounced the place to be holy, in the name of the Father, and of the Son, and of the Holy Ghost. Then he threw some of the dust of the church into the air, several times, as he approached the chancel; and when he came to the rails of the communion table, he bowed towards it several times. Then they all went round the church, repeating the 100th psalm, and afterwards a form of prayer, which concluded thus: *We consecrate this church, and set it apart to thee, O Lord Christ, as holy ground not to be profaned any more to common use.* Returning to the communion table, he pronounced [327]

(z) *Nov.* 5. *cap.* 1. *Nov.* 131. *cap.* 10. The canon law also requires, that the bishop should mark out the consecrated ground, erect the cross, celebrate mass, &c. *De Cons.* 1.

curses against those who should profane that place, and at every curse he bowed towards the east, and said, *Let all the people say Amen.* Afterwards he pronounced blessings on all those who should be benefactors, and repeated, *Let all the people say Amen.* Then there was a sermon; and after that the sacrament was administered; and when he came near the altar, he bowed seven times; and coming to the bread, he gently lifted up the napkin, which he laid down again, and withdrew, and bowed several times; then he uncovered the bread, and bowed as before; the like he did with the cover of the cup; then he received the sacrament, and gave it to some principal men; after which, many prayers being said, the solemnity of the consecration ended. 2 *Rushw. Hist. Colt.* 77.

Again, in the year 1712, a form of consecrating churches and chapels, and churchyards or places of burial, was sent down from the bishops to the lower house of convocation, on the second day of April; and was altered by the committee of the whole house, and reported to the house on the ninth day of the same month; which was agreed to with some alterations: which form, as it did not receive the royal assent, was not injoined to be observed, but is now generally used, and is as follows:

Preparations in order to the consecrating of a church.

The church is to be pewed, and furnished with a reading desk, common prayer, and great bible, and one or more surplices; as also with a pulpit and cushion, a font, and a communion table, and with linen and vessels for the same.

The endowment, and the evidences thereof, are to be laid before the bishop or his chancellor, some time before the day appointed, in order to the preparing of the act or sentence of consecration against that day.

An intimation of the bishop's intention to consecrate the church, with the day and hour appointed for it, is to be fixed on the church door at least three days before.

[328] *A chair is to be set for the bishop on the north side of the communion table, within the rails; and another for his chancellor without the rails, on the same side.*

All things are to be prepared for a communion. The church is to be kept shut, and empty, till the bishop comes, and till it be opened for his going in.

The form of consecrating a church.

(If the church to be consecrated be...)

The bishop is to be received at the west door, or at some other part of the church, or churchyard, which is most convenient for his entrance, by some of the principal inhabitants

At the place where the bishop is received, a petition is to be delivered to him by some one of the persons who receive him, praying that he will consecrate the church.

The petition is to be read by the register.

The bishop, his chaplains, the preacher, and the minister who is to read divine service, together with the rest of the clergy, if any other be present, enter the church, and repair to the vestry, or (if there be no vestry) to some convenient part of the church, where as many as are to officiate put on their several habits; during which time the parishioners are to repair to their seats, and the middle ile is to be kept clear.

new church built in an old parish; then to be met by the minister of the place, the churchwardens, and some of the principal inhabitants.)

As soon as the church is quiet, the bishop and his chaplains, with the preacher and the minister who is to officiate, and the rest of the clergy, if any other be present, return to the west door, and go up the middle ile to the communion table, repeating the 24th psalm alternately, as they go up, the bishop one verse, and they another.

Psalm XXIV.

1. The earth is the Lord's, and all that therein is: the compass of the world, and they that dwell therein.

2. For he hath founded it upon the seas: and prepared it upon the floods.

3. Who shall ascend into the hill of the Lord, or who shall rise up in his holy place?

4. Even he that hath clean hands, and a pure heart: and that hath not lift up his mind unto vanity, nor sworn to deceive his neighbour.

5. He shall receive the blessing from the Lord: and righteousness from the God of his salvation.

6. This is the generation of them that seek him: even of them that seek thy face, O Jacob.

7. Lift up your heads, O ye gates; and be ye lift up, ye everlasting doors: and the King of glory shall come in. [329]

8. Who is the King of glory? it is the Lord, strong and mighty, even the Lord mighty in battle.

9. Lift up your heads, O ye gates; and be ye lift up, ye everlasting doors: and the King of glory shall come in.

10. Who is the King of glory? even the Lord of hosts, He is the King of glory.

The bishop and his chaplains go within the rails; the bishop to the north side of the communion table, and the chaplains to the south side: the minister officiating goes to the reading desk, and the preacher to some convenient seat near the pulpit.

The bishop sitting in his chair, is to have the instrument or instruments of donation and endowment presented to him by the founder,

(This not needful, if it be a new

church built in an old parish.

or some proper substitute which he lays upon the communion table; and then standing up, and turning to the congregation, says,

Dearly beloved in the Lord; forasmuch as devout and holy men, as well under the law as under the gospel, moved either by the secret inspiration of the Blessed Spirit, or by the express command of God, or by their own reason and sense of the natural decency of things, have erected houses for the public worship of God, and separated them from all profane and common uses, in order to fill men's minds with greater reverence for his glorious Majesty, and affect their hearts with more devotion and humility in his service; which pious works have been approved and graciously accepted by our heavenly Father: Let us not doubt but he will also favourably approve our godly purpose, of setting apart this place in solemn manner, to the performance of the several offices of religious worship, and let us faithfully and devoutly beg his blessing on this our undertaking.

Then the bishop kneeling says the following prayer:

O Eternal God, mighty in power, and of majesty incomprehensible, whom the heaven of heavens cannot contain, much less the walls of temples made with hands, and who yet hast been graciously pleased to promise thy especial presence in whatever place even two or three of thy faithful servants shall assemble in thy name, to offer up their praises and supplications unto thee; vouchsafe, O Lord, to be present with us, who are here gathered together, with all humility and readiness of heart, to consecrate
[330] this place to the honour of thy great name; separating it from henceforth from all unhallowed, ordinary, and common uses, and dedicating it to thy service, for reading thy holy word, for celebrating thy holy sacraments, for offering to thy glorious Majesty the sacrifices of prayer and thanksgiving, for blessing thy people in thy name, and for the performance of all other holy ordinances: Accept, O Lord, this service at our hands, and bless it with such success, as may tend most to thy glory, and the furtherance of our happiness, both temporal and spiritual, through Jesus Christ our blessed Lord and Saviour. *Amen.*

After this, let the bishop stand up, and turning his face toward the congregation, say:

Regard, O Lord, the supplications of thy servants: and grant, that whosoever shall be dedicated to thee in this house by baptism, may be sanctified with the Holy Ghost, delivered from thy wrath and eternal death, and received as a living member of Christ's church, and may ever remain in the number of thy faithful and elect children. *Amen.*

Grant, O Lord, that they who in this place shall in their own

persons renew the promises and vows made by their sureties for them at their baptism, and thereupon shall be confirmed by the bishop, may receive such a measure of thy Holy Spirit, that they may be enabled faithfully to fulfil the same, and grow in grace unto their lives end. *Amen.*

Grant, O Lord, that whosoever shall receive in this place the blessed sacrament of the body and blood of Christ, may come to that holy ordinance with faith, charity, and true repentance; and being filled with thy grace and heavenly benediction, may to their great and endless comfort, obtain remission of their sins, and all other benefits of his passion. *Amen.*

Grant, O Lord, that by thy holy word which shall be read and preached in this place, and by thy Holy Spirit, grafting it inwardly in the heart, the hearers thereof may both perceive and know what things they ought to do, and may have power and strength to fulfil the same. *Amen.*

Grant, O Lord, that whosoever shall be joined together in
this place in the holy estate of matrimony, may faithfully perform [331]
and keep the vow and covenant betwixt them made, and may remain in perfect love together unto their lives end. *Amen.*

Grant, we beseech thee, blessed Lord, that whosoever shall draw near unto thee in this place, to give thee thanks for the benefits which they have received at thy hands, to set forth thy most worthy praise, to confess their sins unto thee, and to ask such things as are requisite and necessary, as well for the body as the soul; may do it with such stedfastness of faith, and with such seriousness, affection, and devotion of mind, that thou mayest accept their bounden duty and service, and vouchsafe to give whatever in thy infinite wisdom thou shalt see to be most expedient for them: All which we beg for Jesus Christ his sake, our blessed Lord and Saviour. *Amen.*

The bishop sitting in his chair.

Then the sentence of consecration is to be read by the chancellor, and signed by the bishop, and by him ordered to be registered, and then laid upon the communion table.

After this, the person appointed is to read the service for the day, except where it is otherwise directed.

Proper psalms, 84. 122. 132.
First lesson, 1 Kings, 8. from ver. 22. incl. to v. 62.
Second lesson, Hebr. 10. from v. 19. incl. to v. 26.

After the collect for the day, the minister who reads the service stops till the bishop hath said the following prayer:

O most blessed Saviour, who by thy gracious presence at the feast of dedication, didst approve and honour such religious services as this which we are now performing unto thee, be present at this time with us also by thy Holy Spirit; and because holiness becometh thine house for ever, sanctify us we

pray thee, that we may be living temples, holy and acceptable unto thee; and so dwell in our hearts by faith, and possess our souls by thy grace, that nothing which defileth may enter into us; but that being cleansed from all carnal and corrupt affections, we may ever be devoutly given to serve thee in all good works, who art our Saviour, Lord, and God, blessed for evermore. *Amen.*

Then the minister proceeds in the service of the day, to the end of the general thanksgiving. After which the bishop says the following prayer [*if it be not one of the fifty new churches.*]

(* Or servants.) († Throughout this prayer, for *him, his, he, hath*, say, *them, they, their, she, her, have*, as the occasion shall require.) ‡ [332]

Blessed be thy name, O Lord, that it hath pleased thee to put it into the heart of thy * *servant N.* to erect this house to thy honour and worship. Bless, O Lord, † *him, his* family, and substance, and accept the work of *his* ‡ hands; remember *him* concerning this; wipe not out this kindness that *he* hath shewed for the house of *his* God and the offices thereof; and grant that all, who shall enjoy the benefit of this pious work, may shew forth their thankfulness by making a right use of it, to the glory of thy blessed name, through Jesus Christ our Lord. *Amen.*

[*If the church that is to be consecrated be one of the fifty new churches, which are ordered to be built by the late acts of parliament, the bishop says;*

Blessed be thy name, O Lord God, that it hath pleased thee by thy good Spirit to dispose our gracious sovereign and the estates of this realm, to supply the spiritual wants of thy people, by appointing this and many other churches to be erected and endowed for thy worship and service; multiply thy blessings upon them, for their pious regard to thy honour, and to the good of souls; remember them concerning this, and wipe not out the kindness they have shewed to thy church, and to the offices thereof; and grant that our gracious king may see and long enjoy the fruits of his godly zeal, in the edification of the members of our church, and in the reduction of those, in the spirit of meekness, who dissent from it; that we may all live together in the unity of the Spirit, and in the bond of peace, through Jesus Christ our Lord. *Amen.*]

Then the minister who officiates, is to go on with the prayer of St. Chrysostom, *and the* Grace of our Lord Jesus Christ.

Then a psalm is to be sung, viz. 26. 6, 7, 8. *with* Gloria Patri.

Communion service.

The bishop standing on the north side of the communion table, as before, reads the communion service.

After the collect for the king he says the following prayer:

O most glorious Lord God, we acknowledge that we are not

worthy to offer unto thee any thing belonging to us; yet we beseech thee, in thy great goodness graciously to accept the dedication of this place to thy service, and to prosper this our undertaking: receive the prayers and intercessions of us, and all others thy servants, who either now or hereafter entering into this house, shall call upon thee; and give both them and us grace to prepare our hearts to serve thee with reverence and godly fear: Affect us with an awful apprehension of thy Divine Majesty, and a deep sense of our own unworthiness; that so, approaching thy sanctuary with lowliness and devotion, and coming before thee with clean thoughts and pure hearts, with [333]
bodies undefiled, and minds sanctified, we may always perform a service acceptable to thee, through Jesus Christ our Lord. *Amen.*

The two chaplains are to read, one the epistle, and the other the gospel.

The Epistle, 2 Cor. 6. v. 14. incl. to v. 17.

The Gospel, John 2. v. 13. to v. 18. incl.

Then the bishop reads the Nicene creed. After which, a psalm is sung, viz. Ps. 100.

The Sermon.

The sermon being ended, and all who do not receive the holy communion returned, and the doors shut; the bishop proceeds in the communion service; and he and the clergy having made their oblations, the churchwardens collect the offerings of the rest of the congregation.

After the communion, and immediately before the final blessing, the bishop says the following prayer:

Blessed be thy name, O Lord God, for that it pleaseth thee to have thy habitation among the sons of men, and to dwell in the midst of the assembly of the saints, upon earth; bless, we beseech thee, the religious performance of this day: and grant that in this place, now set apart to thy service, thy holy name may be worshipped in truth and purity to all generations, through Jesus Christ our Lord. *Amen.*

The peace of God, which passeth all understanding, keep your hearts and minds in the knowledge and love of God, and of his Son Jesus Christ our Lord: and the blessing of God Almighty, the Father, the Son, and the Holy Ghost, be amongst you, and remain with you always. *Amen.*

Consecration of a churchyard together with the church.

When the service in the church is finished; the bishop, clergy, and people proceed to the churchyard. And the bishop, standing

in the place prepared for the performance of the office there; the act or sentence of consecration is read by the chancellor, and signed by the bishop, and ordered to be registered.

After which the bishop says the following prayer:

O God, who hast taught us in thy holy word, that there is a difference between the spirit of a beast that goeth downwards to the earth, and the spirit of a man which ascendeth up to God who gave it; and likewise by the example of thy holy servants, in all ages, hast taught us to assign peculiar places, where the bodies of thy saints may rest in peace, and be preserved from all indignities, whilst their souls are safely kept in the hands of their faithful Redeemer: Accept, we beseech thee, this charitable work of ours, in separating this portion of ground to that good purpose; and give us grace, that by the frequent instances of mortality which we behold, we may learn and seriously consider, how frail and uncertain our condition here on earth is, and so number our days, as to apply our hearts unto wisdom. That in the midst of life thinking upon death, and daily preparing ourselves for the judgment that is to follow, we may have our part in the resurrection to eternal life, with Him who died for our sins, and rose again for our justification, and now liveth and reigneth with Thee and the Holy Ghost, one God world without end. *Amen.*

The grace of our Lord Jesus Christ, and the love of God, and the fellowship of the Holy Ghost, be with us all evermore. *Amen.*

Consecration of a churchyard singly.

The ordinary service for the day is to be read at the church, except where it is otherwise ordered.

Psalms 39. 90.

First lesson, Gen. 23.

Second lesson, John, 5. v. 21. incl. to v. 30. or 1 Thess. 4. 13. to the end.

When the service at the church is over; the bishop, clergy, and parishioners repair to the ground which is to be consecrated: And the bishop, standing in the place prepared for the performance of the office, says:

The glorious majesty of the Lord our God be upon us; prosper thou the work of our hands upon us, O prosper thou our handy-work.

[335] *Then the instrument of donation is presented to the bishop.*

Next, the act or sentence of consecration is read by the chancellor, and signed by the bishop, and ordered to be registered.

This done, the bishop reads the prayer that is before directed to be used in a churchyard which is consecrated together with the church.

Then are sung two staves of the 39th *psalm, viz.* v. 5, 6, 7, 8.

After which the bishop lets them depart with the blessing.

The peace of God which passeth all understanding, keep your hearts and minds in the knowledge and love of God, and of his Son Jesus Christ our Lord: and the blessing of God Almighty, the Father, the Son, and the Holy Ghost, be amongst you, and remain with you always. *Amen.*

Other churches not to be prejudiced thereby.

6. In the consecration of a new church, provision is to be made, that no damage accrue, in point of rights or revenues, to any other church. And in the forementioned letter of Innocent the third to king John, one express condition of building new churches is, that by the new building the right of ancient churches be not prejudiced. *Gibs.* 189. (*a*)

Procuration.

7. A reasonable procuration is due to every bishop who consecrates a church, from the person or persons praying such consecration; not for the consecration, but for the necessary refreshment of the bishop and his servants. For whereas ordinations, institutions, and other acts of the like nature, are performed by the bishop within his own walls; this draws him sometimes to a great distance from his palace, where proper accommodations cannot be procured: and therefore, as in his visitations, so also in his consecrations of churches, the law hath provided a reasonable procuration. At first, the laws of the church forbad the demanding or taking any thing, but what the founder voluntarily offered (and some even forbad that); but afterwards the prohibition was limited, *saving the honest and lawful customs of the ecclesiastics*, and (as it is in the foregoing constitution of Othobon) *except the due procuration:* the measure and proportion of which must be determined by the usage of every diocese. In archbishop Warham's time, the see of Bath and Wells being vacant, there is returned among the revenues of the vacancy, for the consecration of three churches, 10*l.*; that is, [336] 3*l.* 6*s.* 8*d.* each. *Gibs.* 190.

The church of Elsefeld, in the diocese of Lincoln, was consecrated in the year 1273; for which was paid a procuration of two marks. *Ken. Par. Ant.* 515.

Re-consecration.

8. A church once consecrated may not be consecrated again. To which general rule of the canon law one exception was, *unless they be polluted by the shedding of blood;* and in that case, the canon supposes a re-consecration; though the common method in England was, a *reconciliation* only, as appeareth by many in-

(*a*) See the beginning of this title, and Chapel, 4.

stances in our ecclesiastical records. (*b*) But in point of ruins or decay, the only exception to the general rule, laid down in the canon, is, *unless they be burnt* (that is, saith the gloss, *for the greater part thereof, and not otherwise*). And a decretal epistle of Innocent the third, where the *roof* was consumed, is, *that since the walls were entire, and the communion table not hurt*, neither the one nor the other ought to be re-consecrated. Thus, a chapel in the suburbs of Hereford, which belonged to the priory of St. John of Jerusalem, had been from the time of the dissolution of monasteries applied to secular uses, and profaned, by making the same a stall for cattle, and a place for laying up their hay and other provender; yet because the walls and roof were never demolished, a *reconciliation* was judged sufficient. In like manner, when another chapel had been long disused, and was *repaired*, and made fit for divine service, the tenor of the reconciliation was, *The same chapel, from all canonical impediment, and from every profanation (if any there were) contracted and incurred, as much as in us lieth, and so far as lawfully we may, by the authority aforesaid, we do exempt, relax, and reconcile the same.* Gibs. 189.

But on the contrary, when the church of *Southmalling* had not only been polluted in manner as aforesaid, but was also *new built*, and then used for divine offices without new consecration; archbishop Abbot interdicted the minister, churchwardens, and parishioners, from the entrance of the church, until the said church and the churchyard thereof should be again consecrated. *Gibs.* 190.

When a churchyard hath been *inlarged*, there hath been a new consecration of the additional part. *Gibs.* 190.

[337] **Feast of the dedication.** 9. In a form of consecrating churches, which we meet with in a canon of the synod held at Celchyth under Wulfred archbishop of Canterbury, in the year 816, it is ordained, that when a church is built, it shall be consecrated by the proper diocesan, who shall take care that the saint, to whom it is dedicated, be pictured on the wall, or on a tablet, or on the altar. And Sir William Dugdale had an old transcript of a decree made by Robert de Winchelsea archbishop of Canterbury, and confirmed by Walter Reynolds, his immediate successor, whereby the parishioners through that whole province were commanded to provide, that the image of that saint to whose memory the church was dedicated, should be carefully preserved in the chancel of every parish church. And Dr. Kennet says, he remembers, in the chancel of the church of Postling in Kent, on the side of the north wall, about five foot from the ground, there was a small square

(*b*) This reconciliation was also allowed by the *Decretal* of *Gregory*. X. 3. 40. 4.

tablet of brass, with a Latin inscription in old characters, telling the time when the church was dedicated to the Virgin Mary.

The *wake* or customary festival for the dedication of churches, doth signify the same as vigil or eve. The reason of the name is best given from an old manuscript legend of St. John Baptist: "Ye shall understand and know how the evens were first founded "in old times. In the beginning of holy church it was so, that "the people came to the church with candles burning, and "would wake and come with lights towards night to the church "in their devotions: and after, they fell to lechery, and songs, "and dances, harping and piping, and also to gluttony and sin; "and so turned the holiness to cursedness. Wherefore the holy "fathers ordained the people to leave that waking, and to fast "the even. But it is still called *vigil*, that is *waking* in English; "and it is also called the *even*, for at even they were wont to "come to church."

It was in imitation of the primitive *αγαπαι*, or love feasts, that such public assemblies, accompanied with friendly entertainments, were first held upon each return of the day of consecration, though not in the body of churches, yet in the churchyards, and most nearly adjoining places.

This practice was established in England by pope Gregory the great; who in an epistle to Melitus the abbot, gives injunctions to be delivered to Austin the monk, a missionary to England; amongst which, he doth allow that the solemn anniversary of dedication should be celebrated in those churches which were [338]
made out of heathen temples, with religious feasts kept in sheds or arbories, made up with branches and boughs of trees round the said church.

But as the love feasts held in the place of worship were soon liable to such great disorders that they were not only condemned at Corinth by St. Paul, but prohibited to be kept in the house of God by the 20th canon of the council of Laodicea, and the 30th of the third council of Carthage; so, from a sense of the same inconveniences, this custom did not long continue of feasting in the churches or churchyards; but strangers and inhabitants paid the devotion of prayers and offerings in the church, and then adjourned their eating and drinking to the more proper place of public and private houses.

The institution of these church encænia, or wakes, was without question on good and laudable designs: at first, thankfully to commemorate the bounty and munificence of those who had founded and endowed the church; next, to incite others to the like generous acts of piety; and chiefly, to maintain a christian spirit of unity and charity, by such sociable and friendly meetings. And therefore care was taken to keep up the laudable custom. The laws of Edward the confessor give peace and pro-

tection in all parishes during the solemnity of the day of dedication, and the same privilege to all that were going to or returning from such solemnity. In a council held at Oxford in the year 1222, it was ordained, that among other festivals should be observed the day of dedication of every church within the proper parish. And in a synod under archbishop Islip (who was promoted to the see of Canterbury in the year 1349), the dedication feast is mentioned with a particular respect.

This solemnity was at first celebrated on the very day of dedication, as it annually returned. (c) But the bishops did sometimes give authority for transposing the observation to some other day, and especially to Sunday, whereon the people could best attend the devotions and rites intended in this ceremony. Thus the parishioners of Bishops Wilton in Yorkshire, complaining to archbishop Kemp, that their wake day on Sept. 15. was inconvenient to be kept on a week day, because it fell in the middle of their harvest; he therefore transferred it to the Sunday
[339] following, by an instrument dated at Bishops Thorp, Sept. 22. 1441. So also at Tadcaster in Yorkshire, the church's festival being on the 28th of August, it was in the year 1314 assigned to be kept on the Sunday next ensuing the feast of the decollation of St. John Baptist. Nay, at last, this convenience of Sunday above the week days was the reason of attempting an universal change. For among the injunctions of king Hen. 8., in the year 1536, it was ordered, that the dedication of churches should in all places be celebrated on the first Sunday of the month of October for ever. Yet this order was not enforced, or not obeyed; but however most of those jubilees are now celebrated near the time of Michaelmas, when a vacation from the labours of harvest and the plough doth afford the best opportunity for visits and sports.

This transposing of the day hath left it more difficult to know the saint to whose protection the church was committed. There be only these grounds of safe conjecture: Such wakes as are observed on the first or second Sunday after Michaelmas day, in these we may doubt a translation of time by virtue of the said injunction of king Hen. 8., or by a prevailing custom of postponing such solemnity to the end of harvest; and in such cases the saint may be lost, unless some other way preserved. But as to those wakes which are precedent to Michaelmas, or distant from that time; these we may believe have continued in their primitive relation to their proper saint, and no farther removed than to the immediate Sunday following. For wherever these Sunday wakes

(c) The *Decret.* directs that the solemnities of dedication be celebrated every year, but does not fix them to a particular day. *De Cons.* 1. 16. & 17.

are guided by a foregoing festival, we may be justly satisfied, the church was dedicated to the saint of that day.

It is a rational and just opinion of sir Henry Spelman, that fairs were first occasioned by the resort of people to that place, for solemnizing some festival, and especially the feast of the church's dedication. And hence he thinks it easy to conjecture to what saint the church had been commended, by the fair day. Indeed pope Gregory the great, in one of his homilies, alludes to this as a popular and familiar custom; and therein plainly intimates, that a fair arises from a conflux of people on the wake or dedication day. In most of the towns and parishes in England (except where the privileges of new fairs hath been in later [340]
times obtained) the old stationary fairs, whether by custom or by ancient charter, depend upon the saint of the church. Thus the primitive fair in Oxford was on the day of St. Frideswide, because it was the dedication day of the chief conventual church. Thus the translation of Becket's body was on the 7th of July, and his passion on the 29th of September; which days being soon celebrated at Canterbury for festivals and days of dedication of altars and chapels to that martyr, it occasioned two fairs in that city annually on those days. On the said 7th of July, there is a fair at Bromhill near Brandon-ferry in Norfolk, and another at West-acre, about four miles distant from Swafham, both called Becket's fair; and in both places there are old ruinous chapels, which were dedicated to that supposed saint.

The charters for fairs, granted by the kings of England, were often a confirmation rather than a new grant; and were chiefly obtained to confer a property, on some particular person, of the profits of the fair; which were before in common, and therefore subject to great disputes. So king Richard gave a charter for a fair to be holden eight days in Peterborough, beginning on the feast of St. Peter; on which day a fair had been kept by immemorial custom, because the church had been dedicated to that saint.

To confirm the original fairs from the dedication of churches, it is observable, that on this account fairs were generally kept in churchyards, and even in the churches; till the indecency and scandal were so great, as to want a reformation. In the year 1230, in the 14th of Hen. 3., among the enquiries to be made at a visitation by all archdeacons within the diocese of Lincoln, the 25th and 26th were to discover and regulate this abuse. Soon after this, king Henry 3. by express mandate forbad the keeping of Northampton fair in the church or churchyard of All-saints in that town. (*d*) Whereupon Robert Grosthead, the

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(*d*) By the statute 27 *Hen.* 6. *c.* 5. it is provided that fairs and markets shall not be kept on certain holy days therein mentioned, nor

good bishop of Lincoln, sent positive instructions through his whole diocese, prohibiting all fairs to be kept in such sacred places, pursuant to the king's example, who had made the like reformation at Northampton. This duty he recommended in letters to his several archdeacons, and then sent a copy of the instructions to all rectors and vicars of churches within his diocese. (5) It was likewise to this relation of fairs to the wakes or
[341] days of dedication, that a custom of old time crept in, of keeping some fairs upon the very Sundays, because the dedication feasts fell on those days; till this abuse, like the other, was thought fit to be restrained: as, for instance, the fairs and markets kept on Sundays at Wallingford, Bercamstead, and Brackley, were altered to week days, by special writs from the king, in the 2d year of king Henry the third. Thus were the anniversaries of a church's dedication celebrated in populous towns with an accustomed fair; and, in the most private parishes, with feasting and a great concourse of people. And as there have been many gifts and legacies to universities and colleges, for the commemorating of founders' and benefactors' days; so were some donations made to churches purely for this pious use, of more solemnly celebrating the wake or dedication feast. Thus Walter de St. Edmund, abbot of Burg, did about the year 1240 give the sum of 40*s.* a-year, for making more plentiful provision in that convent, on the day of the church's consecration.

This laudable custom of wakes prevailed for many ages, till the puritans began to exclaim against it as a remnant of popery. And by degrees the humour grew so popular, that at the summer assizes held at Exeter in the year 1627, the lord chief baron Walter and baron Denham made an order for suppression of all wakes. And a like order was made by judge Richardson for the county of Somerset, in the year 1631. But on bishop Laud's complaint of this innovating humour, the king commanded the last order to be reversed; which judge Richardson refusing to do, an account was required from the bishop of Bath and Wells, how the said feast days, church ales, wakes, and revels, were for the most part celebrated and observed in his diocese. On the receipt of these instructions, the bishop sent for and advised with seventy-two of the most orthodox and able of his clergy; who certified under their hands, that on these feast days (which generally fell on Sundays) the service of God was more solemnly performed, and the church much better frequented, both in the

on any Sunday (the four Sundays in harvest only excepted); on pain of forfeiting the wares so shewed to the lord of the franchises there. Serjt. *Hill's* MSS.

(5) And by 13 *Ed.* 1. *c.* 6. it is enacted, that no fairs or markets shall be kept in churchyards. 13 *Ed.* 1. *c.* 6. *St. Wynton.*

forenoon and afternoon, than on any other Sunday in the year; that the people very much desired the continuance of them; that the ministers did in most places do the like, for these reasons, viz. for preserving the memorial of the dedication of their several churches, for civilizing the people, for composing differences by the mediation and meeting of friends, for increase of love and unity by these feasts of charity, and for relief and comfort of the poor. On the return of this certificate, judge Richardson was [342]
again cited to the council table, and peremptorily commanded to reverse his former order. After which it was thought fit to reinforce the declaration of king James, when, perhaps, this was the only good reason assigned for that unnecessary and unhappy licence of sports. "We do ratify and publish this our blessed "father's decree, the rather because of late in some counties of "our kingdom we find, that, under pretence of taking away "abuses, there hath been a general forbidding, not only of ordi-"nary meetings, but of the feasts of the dedication of churches, "commonly called wakes." However, by such a popular prejudice against wakes, and by the intermission of them in the confusions that followed, they are now discontinued in many counties, especially in the east and some western parts of England, but are commonly observed in the north, and in the midland counties. *Ken. Par. Ant.* 609—614.

III. *Chancel.* (6)

Chancel, *cancellus*, seemeth properly to be so called *a cancellis*, from the lattice-work partition betwixt the quire and the body of the church, so framed as to separate the one from the other, but not to intercept the sight.

By the rubric before the common prayer, it is ordained, that *the chancels shall remain as they have done in times past.*

That is to say, distinguished from the body of the church in manner aforesaid; against which distinction Bucer (at the time of the reformation) inveighed vehemently, as tending only to magnify the priesthood; but though the king and parliament yielded so far, as to allow the daily service to be read in the body of the church, if the ordinary thought fit; yet they would not suffer the chancel itself to be taken away or altered. *Gibs.* 199.

(6) A grant of part of the chancel of a church by a lay impropriator to A., his heirs and assigns, is not valid in law: and, therefore, such grantee, or those claiming under him, cannot support trespass for pulling down his or their pews there erected. *Clifford* v. *Wicks and another*, 2 *Bar. & Ald. Rep.* 498. "For the body of the church the ordinary is to place and displace: in the chancel the freehold is in the parson, and is parcel of his glebe," per lord *Coke, Brownl. and Goldsb. Rep.* 45. Custom may vest this power in the churchwardens. See *infra*, 359 *a*. 362.

IV. *Ile.*

Derivation of the word.

1. Ile is said to proceed from the French word *aile* (*ala*), a wing; for that the Norman churches were built in the form of a cross, with a *nave* and two *wings*.

The word *nave*, or *naf*, is a Saxon word, and signifieth properly the middle of a wheel, being that part in which the spokes are fixed; and is from thence transferred to signify the body or middle part of the church: In like manner, the German *nab*, by
[343] an easy transmutation of the letters *b*, *f*, and *v*, frequent in all kindred languages, signifieth the vertical part of a hill. With which, the word *navel* seemeth also to have some cognation.

Ile a private property.

2. An ile in a church, which hath time out of mind belonged to a particular house, and been maintained and repaired by the owner of that house, is part of his frank tenement: and the ordinary cannot dispose of it, or intermeddle in it. And the reason is, because the law in that case presumes, that the ile was erected by his ancestors, or those whose estate he hath, and is thereupon particularly appropriated to their house. But otherwise it is, if he hath only used to sit and bury in the ile, and not repaired it; for the constant sitting and burying, without reparation, doth not gain any peculiar property therein; but the ile being repaired at the common charge of the parish, the common right of the ordinary takes place, and he may from time to time appoint whom he pleaseth to sit there. *Gibs.* 197.

And in the case of *Corven* and *Pym*, *M.* 10 *J.* it was resolved, that albeit the freehold of the church be in the parson, yet if a lord of the manor, or any other, hath an house within the town or parish, and he and all those whose estate he hath in the mansion-house of the manor or other house, hath had a seat in an ile of the church for him and his family only, and have repaired it at his proper charges; it shall be intended, that some of his ancestors, or of the parties whose estate he hath, did build and erect that ile for him and his family only; and therefore if the ordinary endeavour to remove him, or place any other there, he may have a prohibition. 3 *Inst.* 202.

And in the case of *Frances* and *Ley*, *H.* 12 *J.* In the star chamber: It was resolved by the court, that if an inhabitant and his ancestors only, have used time out of mind to repair an ile in a church, and to sit there with his family to hear divine service, and to bury there; this makes the ile proper and peculiar to his house, and he cannot be displaced or interrupted by the parson, churchwarden, or ordinary himself: but the constant sitting and burying there, without using to repair it, doth not gain any peculiar property, or pre-eminence therein. And if the ile hath been used to be repaired at the charge of all the parish in common, the ordinary may then from time to time

appoint whom he pleaseth to sit there, notwithstanding any usage to the contrary. *Cro. Ja.* 366. [and *Dawney*, or *Dawtrie*, v. *Dee*, *id.* 604.]

3. And the reason of any person's property in an ile is, from the prescription to repair and use it alone; because it is from thence presumed, that the ile was erected by him whose estate he hath, with the assent of the parson, patron, and ordinary, to the intent to have it only to himself. [*Hussey* v. *Leighton.*] 12 *Co.* 105. By prescription. [344]

And therefore, when any person hath good title to such ile; if the ordinary doth place another person therein with the proprietor, the proprietor may have his action upon the case against the ordinary; and if he be impleaded in the spiritual court for the same, a prohibition will lie: or if any private person doth sit therein, or keep out him that hath the right, or doth bury his dead there without his consent; an action upon the case doth well lie for the proprietor. *Wats. c.* 39.

4. But no such title can be good, either upon prescription, or upon any new grant by a faculty from the ordinary, to a man and his heirs; but the ile must always be supposed to be held in respect of the house, and will always go with the house, to him that inhabits it. [*Hussey* v. *Leighton.*] 12 *Co.* 106. [*Crook* v. *Sampson.*] 2 *Keb.* 92. 2 *Bulst.* 150. [*Barrow* v. *Keen.*] 1 *Sid.* 88. To go with the house.

V. *Churchyard.*

1. *Cœmeterium* is derived from κοιμαω, *dormio;* and therefore the churchyard is as it were a dormitory, because the dead bodies are said there to sleep until the resurrection. 2 *Inst.* 489. (*e*) Original of churchyards.

As to the original of burying places, many writers have observed, that at the first erection of churches, no part of the adjacent ground was allotted for interment of the dead; but some place for this purpose was appointed at a farther distance. Especially in cities and populous towns; where agreeably to the old Roman law of the twelve tables, the place of inhumation was without the walls, first indefinitely by the way side, then in some peculiar inclosure assigned to that use. Therefore the Roman pontifical, amongst other inventions, is in this respect convicted of error, that it makes pope Marcellus, under the tyrant Maxentius, appoint twenty-five churches in Rome to bury martyrs in, when at that time laws and customs did forbid all burial within the city. Hence the Augustine monastery was built without the walls of Canterbury (as Ethelbert and Augus-

(*e*) See Burial, 3. On the consecration of churchyards, *vide ante*, pp. 333—335. and 2 *Ought.* 269. *et seq.*

tine in both their charters intimate), that it might be a dormitory to them and their successors, the kings and archbishops, for ever. This practice of remoter burials continued to the age of Gregory the great, when the monks and priests beginning to offer for souls departed, procured leave for their greater ease and profit, that a liberty of sepulture might be in churches or in places adjoining to them. This mercenary reason seems to be acknowledged by pope Gregory himself, whilst he allows that when the parties deceasing are not burdened with heavy sins, it may then be a benefit to them to be buried in churches; because their friends and relations, as often as they come to the sacred places, seeing their graves, may remember them, and pray to God for them. After this, Cuthbert archbishop of Canterbury brought over from Rome this practice into England, about the year 750; from which time they date the original of churchyards in this island. This was a sufficient argument of the learned sir Henry Spelman, to prove an inscription at Glastenbury to be a later forgery; because it pretends, *dominus ecclesiam ipsam cum cœmeterio dedicarat*, whereas there was no cœmitery in England till above 700 years after the date of that fiction. The practice of burying within the churches did indeed (though more rarely) obtain before the use of churchyards; but was by authority restrained, when churchyards were frequent, and appropriated to that use. For among those canons which seem to have been made before Edward the confessor, the ninth bears this title, *De non sepeliendo in ecclesiis*, and begins with a confession that such a custom had prevailed, but must now be reformed, and no such liberty allowed for the future, unless the person be a priest or some holy man, who by the merits of his past life might deserve such a peculiar favour. However, at first it was the nave or body of the church that was permitted to be a repository of the dead, and chiefly under arches by the side of the walls. Lanfrank archbishop of Canterbury seems to have been the first who brought up the practice of vaults in chancels, and under the very altars, when he had rebuilt the church of Canterbury, about the year 1075. *Kent. Par. Ant.* 592, 593.

By the 15 *R.* 2. *c.* 5. Whereas it is contained in the statute *de religiosis* (7 *Ed.* 1. *st.* 2.), that no religious, nor other whatsoever he be, do buy or sell, or under colour of gift or term, or any other manner of title whatsoever, receive of any man, or in any manner by gift or engine cause to be appropriated unto him, any lands or tenements, upon pain of forfeiture of the same, whereby the said lands and tenements in any manner
[346] might come to mortmain; and if any, religious or any other, do against the said statute by art or engine in any manner, that it be lawful to the king and to other lords, upon the said lands

and tenements to enter, as in the said statute doth more fully appear; and now of late by subtile imagination, and by art and engine, some religious persons, parsons, vicars, and other spiritual persons, have entered in divers lands and tenements which be adjoining to their churches, and of the same, by sufferance and assent of the tenants, have made churchyards, and by bulls of the bishop of Rome have dedicated and hallowed the same, and in them do make continually parochial burying, without licence of the king and of the chief lords; therefore it is declared in this parliament, that it is manifestly within the compass of the said statute.

2. By a constitution of archbishop *Winchelsea*: the parishioners shall repair the fence of the churchyard at their own charge. *Lind.* 253. Fence.

And lord *Coke* says, that the parishioners ought to repair the inclosure of the churchyard, because the bodies of the more common sort are buried there, and for the preservation of the burials of those that were or should have been, while they lived, the temples of the Holy Ghost. 2 *Inst.* 489.

And if the churchyard be not decently inclosed, the church (which is God's house) cannot decently be kept: and therefore this the parishioners ought to do, by custom known and approved: and the conusance thereof belonged to the ecclesiastical court. 2 *Inst.* 489. (7)

But nevertheless, if the owners of lands adjoining to the churchyard have used time out of mind to repair so much of the fence thereof as adjoineth to their ground, such custom is a good custom; and the churchwardens have an action against them at the common law for the same. 2 *Roll's Abr.* 287. *Gibs.* 194.

By *Can.* 85. The churchwardens or questmen shall take care, that the churchyards be well and sufficiently repaired, fenced, and maintained, with walls, rails, or pales, as have been in each place accustomed, at their charges unto whom by law the same appertaineth.

By the statute of *circumspecte agatis*, 13 *Ed.* 1. *st.* 4. intitled, certain cases wherein the king's prohibition doth not lie: *If prelates do punish for leaving the churchyard unclosed, the spiritual*

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(7) In *The King* v. *Reynell, clerk*, 6 *East*, 315. a vicar was indicted for a *misdemeanor*, in not repairing the fence of a churchyard which he had been immemorially bound to repair, by means whereof cattle broke in and injured the tombstones, church-porch, &c. to the nuisance of the parishioners. Accordingly, after verdict for defendant, the court of K. B. refused to grant a rule *nisi* for a new trial, on the ground of the verdict being against evidence: leaving the prosecutors to indict again for any continuing want of repair.

judge shall have power to take knowledge, notwithstanding the king's prohibition. (8)

Nevertheless, if the churchwardens sue a person in the court [347] christian, supposing by their libel, that he and all they whose estate he hath in certain land next adjoining to the churchyard have used time out of mind to repair all the fences of the churchyard which are next adjoining to the said land, a prohibition will lie: for this ought to be tried at the common law; inasmuch as this is to charge a temporal inheritance. 2 *Roll's Abr.* 287.

Trees. 3. *Stratford.* Seeing it is prohibited by the laws, both ecclesiastical and secular, for laymen to have power to dispose of things ecclesiastical; in order therefore that the scandal of such usurpation may be utterly abolished, whereby certain parishioners of the parishes within our province, not knowing the limits of their own power, or rather not regarding the same, have *cut down*, or rooted up, *the trees*, or mowed the grass growing in the churchyards of the churches or chapels of our said province, *against the will of the rectors or vicars* of such churches or chapels, or others deputed by them for the custody or cure thereof, and have sacrilegiously applied the same to their own use, *or to the use of the churches*, or of other persons, at their will and pleasure; from whence peril of souls, contentions, and grievous scandals do arise betwixt the ministers of such churches and their parishioners; we do declare, by the authority of the present council, that persons guilty of such contempt shall incur the sentence of the greater excommunication, until they shall make sufficient amends and satisfaction. *Lind.* 267.

Against the will of the rectors or vicars] This is, in churches where there is a rector only, or a vicar only. But if in the same church there be both rector and vicar, it may be doubted (says *Lindwood*) to whether of them the trees or grass shall belong. But I suppose (says he) they shall belong to the rector; unless, in the endowment of the vicarage, they shall be otherwise assigned. *Lindw.* 267.

In *Bellamy's* case, *M.* 13 *J.* This point, unto which of the two the trees do belong, was considered, but not determined; where the vicar sued the parson impropriate in the spiritual court, for cutting them down; and the suit being for damages, and an action of trespass lying at common law, a prohibition was granted, and afterwards, upon the same grounds, a consultation denied: but what became of the main point, that is, to whom the trees of right belonged, appears not; only *Rolle* seems to make the right turn upon this, that they did belong to him who is bound to repair; which determination agrees well with what is said in the statute here following; namely, that the parson shall

(8) See *Com. Dig.* tit. *Prohibition*, *G.* 3.

not cut them down, but when the chancel wants reparation. 2 *Roll's Abr.* 337. *Gibs.* 207, 208.

Or to the use of the churches] That is to the use of the fabric of the church; which it is not lawful to do, without the consent of the rector or vicar to whom they belong. And it is very reasonable, that neither rector nor vicar do fell such trees but for evident necessity of the reparation of the manse of the rectory, or of the chancel. But if the nave of the church want repairing, the rector or vicar will do well (says *Lindwood*) not to be difficult in granting leave to cut down one or two for that use. *Lindw.* 267.

By the 35 *Ed.* 1. *st.* 2. intitled, "*Statutum ne rector prosternat arbores in cœmiterio:*" Because we do understand, that controversies do oftimes grow between parsons of churches and their parishioners, touching trees growing in the churchyard, both of them pretending that they do belong unto themselves; we have thought it good, *rather to decide this controversy by writing than by statute.* Forasmuch as a churchyard that is dedicated is the soil of a church, and whatsoever is planted belongeth to the soil; it must needs follow, that those trees which be growing in the churchyard are to be reckoned amongst the goods of the church, the which laymen have no authority to dispose; but as the holy scripture doth testify, the charge of them is committed only to priests to be disposed of: And yet seeing those trees be often planted to defend the force of the wind from hurting the church; we do prohibit the parsons of the church, that they do not presume to fell them down unadvisedly, *but when the chancel of the church doth want necessary reparation:* neither shall they be converted to any other use, except the body of the church doth need like repair; in which the parsons of their charity shall do well to relieve the parishioners, with bestowing upon them the same trees; which we will not command to be done, but we will commend it when it is done.

Rather to decide this controversy by writing than by statute] And therefore lord Coke calls this law a *treatise* only; and adds, that it is but a declaration of the common law. *Gibs.* 208.

But when the chancel of the church doth want necessary reparations] If it appear that the person whose right they are, intends to cut them down for other purposes; a prohibition will be granted to hinder waste: and so likewise to hinder the cutting down of such trees in the churchyard as are for the defence of the church. And if the trees be actually cut down by any person, for other use than is here specified; it is thought that he may be indicted and fined upon this statute. 11 *Co.* 49. *Gibs.* 208. [349]

In *Strachy* v. *Francis*, *Nov.* 12, 1741, a motion was made on behalf of the plaintiff, who was patron of the living, against the

rector, for an injunction to stay waste, in cutting down timber in the churchyard. By the lord chancellor *Hardwicke:* "A rector may cut down timber for the repairs of the parsonage house or the chancel, but not for any common purpose; and this he may be justified in doing under the Statute of 35 *Ed.* 1. If it is the custom of the country, he may cut down underwood for any purpose; but if he grubs it up it is waste. He may cut down timber likewise for repairing any old pews that belong to the rectory; and he is also entitled to botes for repairing barns and outhouses belonging to the parsonage." — An injunction was granting till the hearing of the cause, to stay the rector from cutting down timber, except in the particular instances before mentioned. 2 *Atkyns*, 217. (*g*)

Way. 4. Although the church and churchyard be the parson's, and be consecrated, yet a man may prescribe to have a way through the church or churchyard. 2 *Roll's Abr.* 265.

Door. 5. No one can make a private door into the churchyard, without the consent of the minister whose freehold the churchyard is, and a faculty also from the bishop for the same. *Par. L.* 88, 89.

Building upon it. 6. *H.* 13 *Geo.* 2. *The rector and parishioners of St. George's Hanover-square* against *Steuart.* The parish was cited to appear in the bishop of London's court, to shew cause why a licence should not be granted to Mr. Steuart, to erect a charity school on part of the churchyard. And upon motion of the rector and parishioners, a prohibition was granted; for the ecclesiastical court hath nothing to do with this, and cannot compel them without their consent. *Str.* 1126.

[350] Boundary. 7. *E.* 8 *G.* 2. *Pew* against *the churchwardens of St. Mary Rotherhithe.* Pew was libelled against in the spiritual court, for nuisance and encroachment on the churchyard; to which he pleaded, that he was the owner of four tenements which formerly stood on the ground in question, and that his present building was upon the old foundation, and did not project further. And this not being a matter properly triable there, a prohibition was granted. For though interrupting the use of a churchyard, as a churchyard, is properly cognizable in the ecclesiastical court; yet the bounds of it, which is matter of freehold, ought not to be determined there. *Str.* 1013.

E. 9 *W. Hilliard* and *Jefferson.* A parson libelled against the defendant in the spiritual court of York for having cut elms in

(*g*) So an injunction was granted to stay waste, against the widow of a rector, at the suit of the patroness, during vacancy (2 *Br. C. C.* 552. *Hoskins* v. *Featherstone*); and may be had by the attorney-general against a bishop, for opening mines, or selling large quantities of timber; but the patron cannot pray an account of the profits for his own benefit. *Knight* v. *Mosely, Amb.* 176.

the churchyard; and a prohibition was granted, upon suggestion that they grew on his freehold. *L. Raym.* 212. (*h*)

VI. *Repairs.* See Dilapidation.

1. Anciently, the bishops had the whole tithes of the diocese; a fourth part of which, in every parish, was to be applied to the repairs of the church: but upon a release of this interest to the rectors, they were consequently acquitted of the repairs of the churches. *Degge, Part.* 1. *c.* 12. Anciently by the bishops.

2. And by the canon law, the repair of the church belongeth to him who receiveth this fourth part; that is, to the rector, and not to the parishioners. (*i*) Next by the rectors.

3. But custom (that is, the common law) transferreth the burden of reparation, at least of the nave of the church, upon the parishioners; and likewise sometimes of the chancel, as particularly in the city of London in many churches there, and this custom the parishioners may be compelled to observe where such custom is. *Lindw.* 53. (*k*) Finally by the inhabitants.

4. But, generally, the parson is bound to repair the chancel. Not because the freehold is in him, for so is the freehold of the church; but by the custom of England, which hath allotted the repairs of the chancel to the parson, and the repairs of the church to the parishioners: yet so, that if the custom hath been for the parish, or the estate of a particular person to repair the chancel, that custom shall be good; which is plainly intimated by Lindwood as the law of the church, and is also confirmed by the common law, in the books of reports. But as to the obligation resting upon the parson or upon the vicar: concerning that, the books of common law say nothing; and so it is wholly left upon that foot on which the law of the church hath placed it. *Gibs.* 199. (9) Repair of the chancel in particular, by the rector. [351]

(*h*) On arrests in churchyards, *post* X. 388.

(*i*) 1 *Salk.* 164.

(*k*) [2 *Inst.* 489. 653.] Where there is no such custom, per *Holt*, C.J. the parson is to repair the chancel. [*Pense* v. *Prouse.*] 1 *Raym.* 59.

(9) The spiritual court has undoubted cognizance of neglect of repair of the church, churchyard and the like. 3 *Bla. Com.* 92. citing *Jeffrey*'s case, 5 *Rep.* 66. If a man resides in one parish, and occupies land in another, he shall be charged to the repair of the church where the land lies; for he is a parishioner there, and may resort to the parish meetings (5 *Rep.* 67. *Paget* v. *Crumpton. Cro. El.* 659. 697. 2 *Roll.* 289. *l.* 20.): but no man shall be charged to repair of the church in respect of land which he has in another parish (5 *Rep.* 67, 2 *Roll.* 289. *l.* 30.), nor in respect of rent of land in lease to another in the same parish, for there is another inhabitant chargeable for it (5 *Rep.* 67. *b.* 2 *Roll.* 289. *l.* 25. 4 *Mod.* 148.); nor in respect of a light-house, *Rebow* v. *Bickerton, Bunbury*, 81.

Sometimes by the vicar.

5. As to the vicars, it is ordained by a constitution of archbishop Winchelsea, that the chancel shall be repaired by the rectors and vicars, or others to whom such repair belongeth. *Lind.* 253.

Whereupon Lindwood observeth, that where there is both rector and vicar in the same church, they shall contribute in proportion to their benefice. *Lindw.* 253.

Which is to be understood, where there is not a certain direction, order, or custom, unto which of them such reparation shall appertain. *Lindw.* 253.

By lay impropriators.

6. And as rectors or spiritual persons, so also impropriators, are bound of common right to repair the chancels. This doctrine (under the limitations expressed in the foregoing article) is clear and uncontested: the only difficulty hath been, in what manner they shall be compelled to do it; whether by spiritual censures only, in like manner as the parishioners are compelled to contribute to the repairs of the church, since impropriations are now become lay fees; or whether by sequestrations (as incumbents, and, as it should seem, spiritual impropriators of all kinds, may be compelled). *Gibs.* 199.

As to this, it is said to have been the opinion of the court of common pleas, that the spiritual court may grant sequestration upon an impropriate parsonage for not repairing the chancel, *M.* 29 *C.* 2. 3 *Keb.* 829. Yet by another book it is said, that the court of common pleas did incline that there could be no sequestration; for, being made lay fee, the impropriation was out of the jurisdiction of the court christian, and they were only to proceed against the person as against another layman for not repairing the church. *T.* 22 *C.* 2. 2 *Ventr.* 35. And by the same case as reported 2 *Mod.* 257. it is said that the whole court except Atkins were of that opinion. *Wats. c.* 39. (*l*)

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On the contrary, Dr. *Gibson* observeth, that impropriations, before they became lay fees, were undoubtedly liable to sequestration; that the king was to enjoy them in the same manner as the religious had done, and nothing was conveyed to the king at the dissolution of monasteries but what the religious had enjoyed; that is, the profits over and above the finding of divine service, and the repairing of the chancel, and other ecclesiastical burthens: and the general saving (he says) in the 31 *H.* 8. *c.* 13. may be well extended to a saving of the right of the ordinary in this particular, which right he undoubtedly had by the law and practice of the church, which said right is not abrogated by any statute whatsoever. *Gibs.* 199.

And he observeth further these things: 1. That although (as was expressly alleged in the two cases above referred to) this

(*l*) See Appropriation, III.

power hath been frequently exercised by the spiritual courts; yet no instances do appear, before these, of any opposition made. 2. That in both the said instances judgment was given, not upon the matter or point in hand, but upon errors found in the pleadings. 3. That one argument against the allowing the ordinary such jurisdiction was, *ab inconvenienti*, that such allowance would be a step towards giving ordinaries a power to augment vicarages; as they might have done, and frequently did, before the dissolution. *Gibs.* 199.

Where there are more impropriators than one (as is very frequently the case) and the prosecution is to be carried on by the churchwardens to compel them to repair, it seemeth advisable for the churchwardens first to call a vestry, and there (after having made a rate for the repair of the church and other expences necessary in the execution of their office) that the vestry do make an order for the churchwardens to prosecute the impropriators at the parish expence. In which prosecution, the court will not settle the proportion amongst the impropriators, but admonish all who are made parties to the suit, to repair the chancel, under pain of excommunication. Nor will it be necessary to make every impropriator a party, but only to prove that the parties prosecuted have received tithes or other profits belonging to the rectory sufficient to repair it; and they must settle the proportion amongst themselves. For it is not a suit against them for a sum of money, but for a neglect of the duty which is incumbent on all of them. Though it may be advisable, to make as many of them parties as can be come at with certainty.

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Repairing the chancel, a discharge from the repairs of the church.

7. Repairing of the chancel, is a discharge from contributing to the repairs of the church. This is supposed to be the known law of the church, in the gloss of John de Athon upon a constitution of Othobon (hereafter mentioned) for the reparation of chancels; and is also evident from the ground of the respective obligations upon parson and parishioners to repair, the first the chancel, the second the church; which was evidently a division of the burden, and by consequence a mutual disengaging of each from that part which the other took. And therefore, as it was declared in serjeant *Davie's* case, (2 *Roll's Rep.* 211.), that there could be no doubt but the impropriator was rateable to the church, for lands which were not parcel of the parsonage, notwithstanding his obligation, as parson, to repair the chancel; so, when this plea of the farmer of an impropriation (2 *Keb.* 730. 742.), to be exempt from the parish rate because he repaired the chancel, was refused in the spiritual court, it must probably have been a plea offered to exempt other possessions also from church rates. *Gibs.* 199. 200.

Repairing a chapel of ease, no dis-

8. If there be a chapel of ease within a parish, and some part of the parish have used time out of mind, alone, without others

charge from the repair of the church.

of the parishioners, to repair the chapel of ease, and there to hear service, and to marry, and all other things, but only they bury at the mother church; yet they shall not be discharged of the reparation of the mother church, but ought to contribute thereto: for the chapel was ordained only for their ease. 2 *Roll's Abr.* 289. *l.* 50. (1)

So in the said case, if the inhabitants who have used to repair the chapel, prescribe that they have time out of mind used to repair the chapel, and by reason thereof have been discharged of the reparation of the mother church: yet this shall not discharge them of the reparation of the mother church, for that is not any direct prescription to be discharged thereof: but it is, by reason thereof, a prescription for the reparation of the chapel. 2 *Roll's Abr.* 290.

If the chapel be three miles distant from the mother church, and the inhabitants who have used to come to the chapel have used always to repair the chapel, and there marry and bury, and have never within sixty years been charged to the repair of the mother church; yet this is not any cause to have a prohibition: but they ought to shew in the spiritual court their exemption, if they have any, upon the endowment. 2 *Roll's Abr.* 290. *l.* 10. (2)

[354] But if the inhabitants of a chapelry prescribe to be discharged *time out of mind* of the reparation of the mother church, and they are sued for the reparation of the mother church; a prohibition lieth upon this surmise. 2 *Roll's Abr.* 290. *l.* 22. *Hobart*, 67. *Brown* v. *Palfry*, 2 *Levinz.* 102.

If there be a parish church and chapel of ease within the same parish, and the chapel of ease hath time out of mind had all spiritual rights except sepulture, and this hath been used to be done at the parish church, and therefore they who have used to go to the chapel of ease have used time out of mind to repair a part of the wall of the churchyard of the parish church, and in consideration thereof, and because that they who are of the chapel of ease have used time out of mind to repair the chapel of ease at their own costs, they have been time out of mind discharged of the reparation of the parish church; this is a good prescription: and therefore, if they be sued in the spiritual court to repair the parish church, a prohibition lieth. 2 *Roll's Abr.* 290. *l.* 30.

If the chapel of ease hath used time out of mind to have all divine services except burial, and the inhabitants within the chapelry have likewise always repaired the chapel, and prescribe, in consideration of 3*s.* 4*d.* a year to be paid for the reparation of the mother church, to be discharged of the reparation of the

(1) *Hobart*, 66. *Semble*, 3 *Mod.* 261.

(2) But see 1 *Salk.* 165.; for then the chapel of ease shall be deemed coeval with the church.

mother church; if the inhabitants of the chapelry are sued for the reparation of the mother church, a prohibition lieth upon this modus. 2 *Roll's Abr.* 290. *l.* 45. (3)

T. 1 *W. Ball* and *Cross.* The inhabitants of a chapelry within a parish were prosecuted in the ecclesiastical court, for not paying towards the repairs of the parish church; and the case was, those of the chapelry never had contributed, but always buried in the mother church, till about Henry the eighth's time the bishop was prevailed on to consecrate them a burial-place, in consideration of which they agreed to pay towards the repair of the mother church. All which appeared upon the libel. And it was held by Holt, chief justice, that those of a chapelry may prescribe to be exempt from repairing the mother church, as where it buries and christens within itself, and hath never contributed to the mother church; for in that case it shall be intended coeval, and not a latter erection in ease of those in the chapelry: but here it appears, that the chapel could be only an erection in ease and favour of them of the chapelry; for they of the chapelry buried at the mother church till Henry the eighth's time, and [355] then undertook to contribute to the repairs of the mother church. 1 *Salk.* 164, 165.

9. If two churches be united, the repairs of the several churches shall be made as they were before the union. *Degge.* *P.* 1. *c.* 12.

Churches united, how to be repaired.

10. *Othobon.* The archdeacon shall cause chancels to be repaired, by those who are bound thereunto. *Ath.* 112.

Ecclesiastical judge shall cause the repairs to be done.

Reynolds. We injoin the archdeacons and their officials, that in the visitation of churches they have a diligent regard to the *fabric* of the church, and especially of the chancel, to see if they want repair; and if they find any defects of that kind, they shall limit a certain time, *under a penalty*, within which they shall be repaired. Also they shall inquire by themselves of their officials in the parishes where they visit, if there be ought in things or persons which wanteth to be corrected; and if they shall find any such, they shall correct the same either then or in the next chapter. *Lind.* 53.

Fabric] The fabric of the church consisteth of the walls, windows, and covering. *Lindw.* 53.

Under a penalty] Where the penalty is not limited, the same is arbitrary (saith *Lindwood*): but this cannot intend here (he says) the penalty of *excommunication*; inasmuch as it concerneth the parishioners *ut universos*, as a body or whole society, who are bound to the fabric of the body of the church: for the pain of excommunication is not inflicted upon a whole body together, although it may be inflicted upon every person severally, who shall

(3) *Semble, Wise* v. *Creck*, 2 *Levinz.* 186.

be culpable in that behalf. And the same may be observed as to the penalty of *suspension*, which cannot fall upon the parishioners as a community or collective body. Yet the archdeacon in this case, if the effect be enormous, may injoin a penalty, that after the limited time shall be expired, divine service shall not be performed in the church, until competent reparation shall be made: so that the parishioners may be punished by suspension or interdict of the place. But if there are any particular persons who are bound to contribute towards the repair, and although they be able, are not willing, or do neglect the same; such persons may be compelled by a monition to such contribution, under pain of excommunication: that so the church may not continue for a long time unrepaired, through their default. *Lindw.* 53.

But this was before the time that churchwardens had the special charge of the repairs of the church: And it seemeth now, [356] that the process shall issue against the churchwardens; and that they may be excommunicated for disobedience. (4)

Stratford. Forasmuch as archdeacons and other ordinaries in their visitations, finding defects as well in the churches as in the ornaments thereof, and the fences of the churchyard, and in the houses of the incumbent, do command them to be repaired under pecuniary penalties; and from those who do not obey do extort the same penalties by censures, wherewith the said defects ought to be repaired, and thereby enrich their own purses to the damage of the poor people; therefore that there may be no occasion of complaint against the archdeacons and other ordinaries, and their ministers, by reason of such penal exactions, and that it becometh not ecclesiastical persons to gape after or inrich themselves with dishonest and penal acquisitions; we ordain, that such penalties, so often as they shall be exacted, shall be converted to the use of such repairs, under pain of suspension *ab officio* which they shall *ipso facto* incur, until they shall effectually assign what was so received to the reparation of the said defects. *Lind.* 224.

By Canon 86. Every dean, dean and chapter, archdeacon, and others, which have authority to hold ecclesiastical visitations by composition, law, or prescription, shall survey the churches of his or their jurisdiction, once in every three years, in his own person, or cause the same to be done.

And by the said canon they were required from time to time to certify the high commissioners for causes ecclesiastical, every year, of such defects in any the said churches, as he or they

(4) The spiritual court may compel payment of a tax for repairing, but not for building a church. Case of *Churchwardens of St. Ann's, Westminster*, 1 *Lord Raym.* 112.

should find to remain unrepaired, and the names and sirnames of the parties faulty therein. Upon which certificate, the high commissioners were desired by the said canon *ex officio mero* to send for such parties, and compel them to obey the just and lawful decrees of the ecclesiastical ordinaries making such certificates.—But by the 16 *C.* c. 11. the high commission court was abolished; so that the cognizance thereof now resteth solely upon the ecclesiastical judge.

11. By the statute of *circumspecte agatis*, 13 *Ed.* 1. *st.* 4. If prelates do punish for that *the church* is uncovered, or not conveniently decked, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition. **No prohibition in case of repairs. (5)**

The Church] This is intended not only of the body of the church, which is parochial, but also of any public chapel annexed to it; but it extendeth not to the private chapel of any, though it be fixed to the church, for that must be repaired by him that hath the proper use of it, for he that hath the profit ought to bear the burden. And this the parishioners ought to do, by [357] custom known and approved; and the conusance thereof is allowed to the ecclesiastical court by this act. 2 *Inst.* 489.

21. *Can.* 85. The churchwardens or questmen shall take care and provide, that the churches be well and sufficiently repaired, and so from time to time kept and maintained, that the windows be well glazed, and that the floors be kept paved, plain, and even. **Churchwardens' duty therein.**

If the churchwardens erect or add any thing new in the church, as a new gallery where there was none before, they must have the consent of the major part of the parishioners, and also a licence of the ordinary. 1 *Mod.* 237. [*Groves and another* v. *Rector, &c. of Hornsey*, 1 *Hagg. Rep.* 188.]

But as to the common reparations of the fabric or ornaments of the church, where nothing new is added or done, it doth not appear that any consent of the major part of the parishioners is necessary; for to this the churchwardens are bound by their office, and they are punishable if they do it not.

If the major part of the parishioners of a parish, where there are four bells, agree that there shall be made a fifth bell, and this is made accordingly, and they make a rate for paying for the same; this shall bind the lesser part of the parishioners, although they agree not to it: for otherwise any obstinate persons may hinder any thing intended to be done for the ornament of the church. 2 *Roll's Abr.* 291.

And although churchwardens are not charged with the repairs of the chancel, yet they are charged with the supervisal thereof, to see that it be not permitted to dilapidate and fall into decay;

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(5) See *Com. Dig.* tit. *Prohibition.* (*G* 2.)

and when any such dilapidations shall happen, if no care be taken to repair the same, they are to make presentment thereof at the next visitation.

[Rate for repair.] If a church be so much out of repair that it is necessary to pull it down, or [if it be] so little, that it needs to be enlarged, the major part of the parishioners, having first obtained the consent of the ordinary to do what is needful, and meeting upon due notice, may make a rate for new building, or enlarging, as there shall be occasion. This was declared in the 29 *C.* 2. by all the three courts successively; notwithstanding the cause was much laboured by a great number of quakers who opposed the rate. 2 *Mod.* 222. *Gibs.* 197.

And the proper method of proceeding in such case seemeth to be thus: namely, that the churchwardens first of all take care that public notice be given in the church for a general vestry of [358] the whole parish for that purpose; which notice ought to be attested and carefully preserved, as being the foundation of all the subsequent proceedings. At the time and place of meeting, the minister and churchwardens ought to attend; and when the parishioners are assembled, the minister is proper to preside; and he, or one of the churchwardens, or such person as shall be appointed by them, ought to enter the orders of the vestry, and then have them read and signed. And agreeable thereunto, a petition to the ordinary for a faculty (setting forth the particulars) should be drawn up and signed by the minister, churchwardens, and parishioners present and approving thereof. Whereupon the ordinary will issue a monition, to cite all persons concerned, to shew cause why a faculty should not be granted. Upon the return of which citation, if no cause, or not sufficient cause is shewed, the ordinary will proceed to grant a faculty as is desired, and as to him shall seem good. (6)

(6) See infra Church Rate. If the major part of a parish at a vestry agree to make repairs, the others are bound, though it be to find ornaments, as new bells, &c. (2 *Rol.* 291. *l.* 20.); but bells are not mere ornaments, for they are as necessary as the steeple itself. *Woodward* v. *Makepeace*, 1 *Salk. Rep.* 164. A rate by the churchwardens *only* is not sufficient, if the parish refuse. *Pierce* v. *Prouse*, 1 *Salk. Rep.* 165. *Dub.* 1 *Ventr.* 165.

Groves and *Wright* v. *the Rector*, &c. of *Hornsey*, 1 *Hagg. Rep.* 188. was a case in which a large majority of the parishioners, assembled in vestry, voted that an application should be made to the ordinary for a faculty to erect a gallery, for accommodation of the increased population of the parish, which was distinctly proved by the building of new houses, and the many applications to churchwardens for pews, which they were unable to satisfy from want of room. It was objected, that such a gallery would endanger the fabric and darken the pews; but not that the expence would burthen the parish, nor that the sym-

VII. *Church seat.*

1. Before the age of the reformation no seats were allowed, nor any distinct apartment in the church assigned to distinct inhabitants; except for some very great persons. The seats that were, were moveable, and the property of the incumbent, and so in all respects at his disposal. Many wills of incumbents are to be seen, whereby they did of old bequeath the seats in the church to their successors or others as they thought fit. Athon and Lindwood are silent in the case. The common law books mention but two or three cases before this time, and those relating to the chancels, and seats of persons of great quality. *Johns.* 175, 176. *Ken. Par. Ant.* 596.

Original of the distinct property in seats. [See *Com. Dig.* tit. *Esglise,* (G 3.)]

2. And generally, the seats in churches are to be built and repaired as the church is to be, at the general charge of the parishioners, unless any particular person be chargeable to do the same by prescription. *Degge, P.* 1. *c.* 12.

Of common right to be repaired by the parishioners.

3. And although the freehold of the body of the church be in the incumbent thereof, and the seats therein be fixed to the freehold; yet because that the church is dedicated to the service of God, and is for the use of the inhabitants, and the seats are erected for their more convenient attending upon divine service, the use of them is common to all the people that pay to the repair thereof. (7) And for this reason, if any seat, though affixed to the church, be taken away by a stranger; the churchwardens, and not the parson, may have their action against the wrong doer. *Wats. c.* 39. [359]

Use of the seats in the parishioners. (7)

4. But the authority of appointing what persons shall sit in each seat (8) is in the ordinary; who is to take care to order

Bishop to dispose the same.

metry and proportions of the church would be violated. The objections made were rebutted, and the faculty was decreed without costs.

A rate to reimburse churchwardens sums expended or to be expended on the parish church is bad on the face of it, as in part retrospective. *The King* v. *Haworth (chapelwardens),* 12 *East,* 556.

(7) A parishioner has a right to a seat in the church without payment to the parish; and in a proceeding against churchwardens, to oblige them to furnish a parishioner with a seat, the return that there was no pew vacant might have been sufficient; but the mere offer of permission to erect a pew is not, if there are existing pews improperly occupied. *Walter* v. *Gunner & Drury,* 1 *Hagg. Rep.* 317.

(8) In *Groves* and *Wright* v. *the Rector,* &c. of *Hornsey,* 1 *Hagg. Rep.* 394. the parties opposed to building a gallery in the church objected, *inter alia,* that the churchwardens might put different families into the same pew, as the pews were not appropriated by any faculty from the ordinary; but lord *Stowell* observed, that they did not say that they were not so appropriated by *custom,* or by some other title which the court would respect, till it was disputed in a regular and proper

all things appertaining to divine service, so that the service of God may be best celebrated, that there be no contention in the church, and that all things be done decently and in order: for he, having the cure of souls, is presumed by the law to be a person that will have a prudent regard to the qualities of men in this case, and to give precedence to such as ought to have it. *Wats.* c. 39.

In the aforesaid case of *Corven* and *Pym*, it was resolved, that if any man hath an house in a town or parish, and he and those whose estate he hath in the house have had time out of mind a certain pew or seat in the church, maintained (9) by him and them; the ordinary cannot remove him (for prescription maketh certainty the mother of quietness), and if he do, a prohibition lieth against him. But where there is no prescription; there the ordinary, that hath the cure and charge of souls, may for the avoiding of contention in the church or chapel,

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manner; that they might be appropriated by prescription, or by possessory right on allotment of churchwardens. That a prescriptive title could not be altered by any authority; nor a possessory title by the churchwarden alone, though it might be by the ordinary. The incumbent has no authority in seating and arranging his parishioners, except as an individual member of vestry; nor are the churchwardens *bound* to follow the directions of the vestry, though at the same time their sense and opinion ought to have weight with them: but the distribution of seats rests with the ordinary, whose officers the churchwardens are, to place the parishioners according to their rank and station, and are subject to his control if any complaint is made against them. *Pettman* v. *Bridger*, 1 *Phill. Rep.* 323.

(9) To exclude the jurisdiction of the ordinary from the disposal of a pew, it is necessary, not merely that possession should be shewn for many years, but that the pew should have been built and repaired *time out of mind*. *Stocks* v. *Booth*, 1 *T. R.* 428. The possession must be ancient, and going beyond memory, though not beyond the high legal memory. A person claiming a pew must shew either a faculty, or prescription which will suppose a faculty; but mere presumption is not sufficient without some evidence on which a faculty can reasonably be presumed. The strongest evidence of that kind is the building and repairing time out of mind; for mere repairing for thirty or forty years will not exclude the ordinary. Per lord *Stowell*, in *Walter* v. *Gemmer and Drury*, 1 *Hagg. Rep.* 322. If any repairs have been required within memory, they must be proved to have been made at the expence of the party setting up the prescriptive right. Mere occupancy does not annex pews to particular houses, for though in country parishes the same families occupy the same pews for a long time, they still belong to the parish at large: unless the inhabitants of a particular house have *repaired* the pew, for then, the burthen and benefit have gone together. What might be the effect of a very long occupancy, where no repairs have been necessary, seems undecided. *Pettman* v. *Bridger*, 1 *Phillim. Rep.* 325.

and the more quiet and better service of God, and placing of men according to their qualities and degrees, take order for the placing of the parishioners in the church or chapel public, which is dedicate and consecrate to the service of God. 3 *Inst.* 202.

For the disposal of the seats in the nave of the church appertaineth of common right to the bishop of the diocese; so that he may place and displace whomsoever he pleaseth. 2 *Roll's Abr.* 288.

Churchwardens' power to dispose of the same.

5. But by custom, the churchwardens may have the ordering of the seats, as in London; which, by the like custom, may be in other places. *Wats. c.* 39.

For a custom time out of mind, of disposing of seats by the churchwardens and major part of the parish, or by twelve or any particular number of the parishioners, is a good custom; and if the ordinary interpose, a prohibition will be granted. *Gibs.* 198.

But the churchwardens must shew some particular reason, why they are to order the seats exclusive of the ordinary: for a *general* allegation, that the parishioners have used to repair and build all the seats in the church, and by reason thereof the churchwardens have used to order and dispose of the seats, is not sufficient to take away the ordinary's power in disposing and ordering the seats (1); because this is no more than the parishioners are bound to do of common right, to wit, building and repairing the seats, for which they have the easement and convenience of sitting in them. *Wats. c.* 39. [360]

But if through the increase of inhabitants, more pews or galleries be necessary; it is said to be agreed, that the churchwardens cannot erect them of their own head. Some say, it cannot be done without the licence of the ordinary. And it is clear; if there be a dispute whether more pews are necessary, or where they shall be placed, the ordinary is sole judge in that case. (2) But if the incumbent, churchwardens, and parishioners do unanimously agree, that more pews are necessary, and that they shall be fixed in such a place; it doth not seem that there is any necessity for the ordinary's interposition: for there

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(1) *Presgrave* v. *Shrewsbury (churchwardens)*, 1 *Salk.* 167. *Aliter*, on shewing ground of prescription. *Gibs.* 198. *Rol. Rep.* 24.

(2) See *Groves and another* v. *Rector of Hornsey*, 358, *notis*. The incumbent may represent to the ordinary that a plan of adding a gallery, &c. disfigures or darkens the church, or diminishes accommodation; therefore, where no proof of any such fact was given, a faculty for erection of a gallery in a church was granted notwithstanding his opposition, for the expence is that of the parish, and the churchwardens are bound to repair with consent of vestry. *Tattersall* v. *Knight*, 1 *Phill. Rep.* 232.

can be no need of a judge, where there is no controversy. *Johns.* 163. *Ayl. Parerg.* 484. [1 *Salk.* 167.]

Reparation necessary to make a title.

6. If a person prescribe, that he and his ancestors, and all they whose estate he hath in a certain messuage, have used to sit in a certain seat in the nave of the church for time out of mind, in consideration that they have used *time out of mind* (3) to repair the said seat: if the ordinary remove him from this seat, a prohibition lieth; for the ordinary hath not any power to dispose thereof, for this is a good prescription, and by intendment there may be a good consideration for the commencement of this prescription, although the place where the seat is be the freehold of the parson. 2 *Roll's Abr.* 288.

But if a person prescribe to have a seat in the nave of the church, generally, without the said consideration of repairing the seat, the ordinary may displace him. 2 *Roll's Abr.* 288.

Seat not to go to a man and his heirs.

7. A seat may not be granted by the ordinary to a person and his heirs absolutely (4); for the seat doth not belong to the person, but to the inhabitants; otherwise, if he and his heirs go away, and dwell in another parish, they shall yet retain the seat, which is unreasonable. *Gibs.* 197.

Seat may be prescribed for,

8. A seat in the nave or body of a church, may be prescribed for as belonging to a house. (5) This doctrine was heretofore

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(3) 1 *Hagg. Rep.* 322. 1 *Phillim. Rep.* 320. *acc.*

(4) In *Brabin* v. *Tradum, Poph. Rep.* 140, prohibition was granted where the ordinary had granted a seat to one *and his heirs:* for the seat does not belong to the person but to the house: for otherwise when the person goes out of the town to dwell in another place, yet he shall retain the seat, which is no reason. *E.* 15. *Jac.* See 2 *Roll. Abr.* 287. *Stocks* v. *Booth,* 1 *T. R.* 432. S. P.

In *Langley* v. Sir *Thos. Chute, Raym. Rep.* 246. Prohibition refused to libel for sole use of a pew, to which the churchwardens would have appointed another person than the person appointed by the ordinary, because (per 3 of 4 *J.'s*) the ordinary hath jurisdiction, and the churchwardens cannot justle out his authority, when the privilege is claimed only for defendant *and his family;* because as to him *and his heirs* a prohibition lies (*Popham,* 140.): and if the plaintiff is grieved by the sentence he may appeal; for the common law court may determine a point on the canon law, if the party may appeal. *May* v. *Gilbert,* 2 *Bulstr. Rep.* 151.

(5) And per lord *Kenyon,* a pew may be annexed to a house by a faculty, as well as by prescription, which supposes a faculty; and in that case may be transferred with the messuage. And his lordship said, he had seen a faculty for exchanging seats in a church, which were annexed to houses. *Stocks* v. *Booth,* 1 *T. Rep.* 431. In *Tattersal* v. *Knight,* 1 *Phill. Rep.* 237., the court said, no gift of a pew is good without a faculty. *Rogers* v. *Brooks,* 1 *T. Rep.* 431. *note.* Great inconvenience has been found to arise from annexing pews to houses; the houses become dilapidated; the inhabitants of them fail

doubted, and sometimes denied and over-ruled, with regard to the general right of the ordinary, and the jurisdiction of the spiritual authority; but it seems now to be the doctrine received. Only, the reparation of it by the person pleading such prescription, and praying a prohibition thereupon, must of necessity be alleged here; because the ordinary in the body of the church *primâ facie* hath the right, and nothing but such private reparation can divest him of that right; which right stands good and intire (notwithstanding possession and use time out of mind) if the parish have but repaired. But it hath been held, that in two cases, reparation need not be particularly pleaded; first, in case of prescription for an ile, because (say they) by the common law the particular persons are supposed to repair, and so need not shew it; and the foundation of the right may be for other causes than repairing, as for being founder, or having been contributory to its building: but this is not out of question. The second case (which hath often been declared for law) is, where an action upon the case is brought against one who disturbs another in his seat; which disturber being a stranger, and having not any right *primâ facie*, the possession of the other is a sufficient ground of action, and it needs not be alleged that he repairs. *Gibs.* 197, 198. (6)

as belonging to a house.

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Thus in the case of *Kenrick* and *Taylor*, *E.* 25. *G.* 2. On a special action upon the case, against the defendant for disturbing the plaintiff in his pew, which he claims by prescription as appurtenant to his messuage in the parish; the declaration sets forth, that the plaintiff and all those whose estate he hath in the said messuage have time out of mind repaired the pew. A verdict was given for the plaintiff, subject to the opinion of the court, upon a case which stated that at the trial there was no evidence given that the plaintiff, or any of the owners of the messuage, had ever repaired or been obliged to repair the pew, or that the pew had ever wanted repairing. (7) The question was, whether the plaintiff can maintain this action without

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in their circumstances; new houses are erected, and the occupiers of them want pews. It is very desirable, that after due time has been given as encouragement to those who build them, that seats should return to the disposition of the ordinary. The form of the grant should be "*as long as they continue inhabitants of the parish, or as long as they continue inhabitants of the parish and occupiers of the messuages stated;*" the former of these is the more usual, as it gives no notion of annexing to houses. Persons having pews appurtenant to their houses, cannot let them to nonresident persons, and thus by contract defeat the general right of the parish. *Walter* v. *Gunner and another*, 1 *Hagg. Rep.* 317—319. and cases *in notis.*

(6) *Roll. Rep.* 24. *acc.* and see 362. *note a.*

(7) See *Pettman* v. *Bridger.* 359. *note* (9).

proving repairs done to the pew. It was argued for the plaintiff, that as this was an action by one in possession against a mere stranger and wrong doer, there was no necessity to prove any repairs; and that there was a great difference between an action against a stranger, and a *contest* with the ordinary in prohibition; for at common law the ordinary has the disposal of all the seats in the church: and although they be built and repaired at the charge of the whole parish, yet that will not oust him of his jurisdiction, and therefore a special title
[362] must be shewed against him by building or repairing the seat; but possession alone is sufficient against a mere stranger. And of this opinion was the court; who said that this being a possessory action against a stranger and a mere wrong doer, the plaintiff was not obliged to prove any repairs done by himself or others whose estate he hath; for it is a rule in law, that one in possession need not to shew any title or consideration for such possession against a wrong doer. (*m*) But it is otherwise where one claims a pew or an ile against the ordinary, who undoubtedly hath *primâ facie* the disposal of all the seats in the church:

(*m*) Possession must, however, be understood according to the subject matter, and in this case must be supported by a title derived either from prescription or a faculty. *Stocks* v. *Booth*, 1 *T. Rep.* 428. But possession for thirty-six years, [of a pew claimed *as appurtenant to a messuage in the parish,*] was holden to be presumptive evidence of a prescriptive right, in a case where the church had been rebuilt about forty years before. *Ib.* 431. *Rogers* v. *Brooks*. Yet in a later case, it appearing that the seat itself was built thirty-five years ago, for the accommodation of the plaintiff, and to put an end to a dispute between two families, this proof was holden to rebut the presumption which would otherwise arise from so long a possession. *Griffith* v. *Matthews*, 5 *T. Rep.* 296. [A possessory right in a pew is sufficient to maintain a suit against a mere disturber, but not against the churchwardens and ordinary; though if the churchwardens causelessly displace persons in possession, the ordinary will replace them. *Pettman* v. *Bridger*, 1 *Phill. Rep.* 316., 1811. An uninterrupted possession of a pew for thirty years unexplained is presumptive evidence of a prescriptive right to the pew, in an action on the case for a disturbance: but that presumption may be rebutted by proof that prior to that time the pew had no existence. *Rogers* v. *Brooks*, 1 *T. Rep.* 431., *note*. Trespass will not lie for entering a pew, because the plaintiff has not the exclusive possession, the possession of the church being in the parson. 1 *T. Rep.* 430. Upon a libel in the consistorial court, for disturbance in plaintiff's right to a pew, the court adjudged *the right* to be in the plaintiff, and admonished defendant not to sit in the pew; the court of arches *reversed* the sentence, but admonished the defendant not to use the pew again. These sentences were held *not conclusive* evidence of the plaintiff's right in an action for a disturbance between the same parties. *Cross* v. *Salter*, 3 *T. R.* 639.

and against his title or consideration must be shewn in the declaration, and proved. 1 Phil. Rep. 326. (n)

9. A seat cannot be claimed by prescription, as appendant to *land*, but to an house. (9) For such a seat belongeth to the house in respect of the inhabitants thereof: and yet it hath been held, that a seat in an ile may be prescribed for by an inhabitant of another parish. *Gibs.* 198. (o) And not as belonging to the land.

10. As a seat in the church, so priority in a seat may be prescribed for. Thus it was declared in the case of *Carleton* and *Hutton, E. 2 Cha.* Carleton claimed the upper place in a seat. Hutton disturbed him. The archbishop of York sent an inhibition to Carleton, till the matter should be determined before him. But prescription was surmised, and thereupon prohibition obtained: because, as well the priority in the seat, as the seat itself, may be claimed by prescription. *Noy.* 78. *Latch.* 116. Priority in a seat may be prescribed for.

11. Dr. *Gibson* asserts, that the seats in the chancel are under the disposition of the ordinary, in like manner as those in the body of the church. Which needs only to be mentioned (he saith), because there can be no real ground for exempting it from the power of the ordinary; since the freehold of the church [363] Bishop's disposition of seats in the chancel.

(n) [*Brunton* v. *Bateman*,] 1 *Lev.* 72. [1 *Sid.* 281. 3. S. C. *Astley* v. *Freckleton*,] 3 *Lev.* 73.

(9) 1 *Phil. Rep.* 325. acc. per lord *Coke*, in *Brownl. and Gouldsb. Rep.* 45. *contra.*

(o) *Siderf.* 36. n. S. C. 2 *Keb.* 342. [*Barrow* v. *Kew*,] for the inhabitant may have built the ile, and may be bound to repair it. But the court doubted if such prescription would be good for a seat in the nave of the church. 1 *Sid. ib.* In the court of exchequer it was held, that a pew in the *ile* of a church may be prescribed for as appurtenant to a house out of the parish. *Davis* v. *Witts*, *Forrest's Rep.* 14. [and see *Dawney* v. *Dee*, *Cro. Jac.* 604. as observed on *arguendo* in 2 *B. & A. Rep.* 504.; but quære, as to a pew in the body. An action at common law will not lie for disturbing another in the possession of a pew, unless the pew is annexed to a house in the parish. *Mainwaring, bart.* v. *Giles*, 5 *Bar. and Ald. Rep.* 356. And *Abbot*, C. J. inclined to think, that the remedy for intrusion into a pew, being by action on the case, and not by action of trespass (see 1 *T. R.* 430.), shewed that a pew is annexed to the house as an easement. 5 *B. & A.* 361. In 1 *Phil. Rep.* 327., an averment that a pew has been from time immemorial annexed to a house, was held sufficient, as including the averment that it had been used, occupied, and repaired from time immemorial. Again, a bill will not lie to be quieted in possession of a pew, though plaintiff had a decree before the ordinary for it; for the court cannot examine whether the bishop has done right, nor will his decree bind his successor. *Hutter* v. *Child*, 2 *Vernon*, [illegible] An old entry in a vestry book, signed by the churchwardens, stating that a pew had been repaired by A. in consideration of his using it, is evidence for a person claiming the pew under A. *Price* v. *Littlewood*, 3 *Camp.* 288.]

is as much in the parson, as the freehold of the chancel; but this hinders not the authority of the ordinary in the church, and therefore not in the chancel. And in one of our records, he says, in archbishop Grindal's time, we find a special licence issued, for the erecting seats in the chancel of a church, together with the rules and directions to be observed therein. *Gibs.* 200.

And Dr. *Watson* argues to the same purpose: although the law (he says) seems now to be settled to the contrary. *Wats. c.* 39. (1)

Impropriator's seat in the chancel.

12. The parson, or rector impropriate, is intitled to the chief seat in the chancel. This was resolved by the court of king's bench, *T. 7 J.* in the case of *Hall* and *Ellis*, that so it is of common right, in regard to his repairing the chancel; but it was declared at the same time, that by prescription another parishioner may have it. *Noy.* 153. *Johns.* 261.

Vicar's seat in the chancel.

13. In some places, where the parson repairs the chancel, the vicar by prescription claims a right of a seat for his family, and of giving leave to bury there, and a fee upon the burial of any corpse. *Johns.* 242, 243.

As to the right of a seat in the chancel, it was originally inherent in every vicar. For before the reformation, the hours of the breviary were to be sung or said in the chancel (not in the body of the church), by the express words of a constitution of archbishop Winchelsea; and this was to be done, not only on Sundays and festivals, but on other days, by another constitution of the said archbishop: and these hours were to be sung or rehearsed, not by the vicar alone, but with the consort and assistance of all the clergymen belonging to the church, which were the ecclesiastical family of the vicar. So that it is evident, that all vicars had a right of sitting there before the reformation, and by consequence must retain this right still, unless it appear that they have quitted it: and if they have not for forty years past used the right, this breeds a prescription against them in the ecclesiastical courts. In many chancels are to be seen the

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(1) In *Clifford* v. *Wicks and Townsend*, 1 *Bar. and Ald. Rep.* 498. it was held, that a general grant of part of the chancel of a church by a lay impropriator to A., his heirs and assigns, is not valid in law; and therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down his or their pews there erected; for if such a grant were good, it would take the chancel entirely out of the jurisdiction of the ordinary, so that it might be desecrated or filled with seats which might descend to strangers and exclude the parishioners. The chancel was unalienable by the rector without consent of the ordinary before the dissolution of the monasteries: and the general saving in 31 *H.* 8. *c.* 13. § 4. leaves this right as it existed before. Per *Holroyd* J. *id.* 507, 8.; see also *Pettman* v. *Bridger*, *supra*, 359. note (2).

ancient seats or stalls used by the vicar and his brethren in performing these religious offices, like those which remain in the old choirs of cathedral and collegiate churches; and from hence it is, that *cancellus* and *chorus* (the chancel and the choir) are words of the same signification. This being the place where the body of the clergy of every church did sing, or at least rehearsed their breviary: and if any common parishioner may prescribe to a pew in the chancel, much more may the vicar. *Johns.* 243. [364]

As these seats were placed at the lower end of the choir or chancel, for the daily use of the vicar; so at the upper end stood the high altar of every church, where, as the vicar or his representative was obliged to celebrate mass every Sunday and holiday of obligation, so he might do it every day, if there was occasion, or if he pleaseth; so that it is clear, the use of the chancel was entirely in the vicar, whoever repaired it; and therefore no wonder if the pavement were not to be broken up without his leave; and that thereupon he should acquire a right of receiving what fees were due on such occasions. And the reformation left the rights of parson and vicar as it found them. *Johns.* 244.

It is therefore a very groundless notion with impropriators, that they have the same right in the great chancel that a nobleman hath in a lesser. (2) These lesser chancels are supposed by lawyers to have been erected for the sole use of these noble persons; whereas it is clear the great chancels were originally for the use of clergy and people, but especially for the celebration of the eucharist, and other public offices of religion, there to be performed by the curate and his assistants. That the parsons repair these great chancels, doth not at all prove their sole right to them; for they were bound originally to repair the church as well as chancel; and of common right the repairs of the church are still in the parson; it is custom only eases them of this burden. The ordinary hath no power to order morning or evening prayer to be said in noblemen's chancels, but he can order them to be said in the great chancel. *Johns.* 244, 245.

Seats pulled own. (2)

14. If any seats annexed to the church be pulled down, the property of the materials is in the parson, and he may make use of them if they were placed in the church by any one of his own head, without legal authority; but for the seats erected by the parishioners by good authority, it seemeth that the property of the materials upon removal is in the parishioners. *Degge*, P. 1. c. 12.

If any persons on their own heads shall presume to build any

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(2) See *Clifford* v. *Wicks*, *supra*, 361. *note* (1).

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seat in the church, without licence of the ordinary, or consent
[365] of the minister and churchwardens, or in any inconvenient place, or too high; it may be pulled down by order from the bishop, or his archdeacon, or by the churchwardens, by the consent of the parson: for the freehold of the church, and all things annexed to it, are in the parson; and therefore if any presume to cut or pull down any seat annexed to the church, the parson may have an action of trespass against the misdoer (though he formerly set it up), if he do it without the parson's consent, or order from the ordinary; but if the seat be set loose, he that built it may remove it at his pleasure. *Degge, P.* 1. *c.* 12.

In the case of *Gibson* and *Wright*, in an action of trespass brought by Gibson, for breaking and cutting in pieces his pew, and taking it away; the defendants pleaded, that they were churchwardens, and that the plaintiff had built it in the church without licence. And by the court, The trespass is confessed; for though they may remove the seat, they cannot cut the timber and materials into pieces. *Noy.* 108.

But it hath been said, that this case is not law; because the freehold of the church being in the incumbent, when the person has fixed a seat to it, it is then become parcel of his freehold, and consequently the right is in him; so that the breaking the timber could not be prejudicial to the other, because he had no legal right to the materials after they were fixed to the freehold. *Nels.* 493. *Ayl. Par.* 486.

And Dr. *Watson* saith, although he will not question the law of this case, yet thus much is to be said against it; that the freehold being in another person, the annexing of the seat thereto seems to make the seat to be a part of the freehold, and so to be in him in whom the freehold is, and the use of it in them that have the use of the church; and if so, then the breaking the timber could be no wrong to him that had no legal right in it after it was fastened to the freehold, and became (as other seats) of common use, and at the disposal of the ordinary. *Wats. c.* 39. (3)

And further he saith, that if a man with the assent of the ordinary doth set up a seat in the nave of the church for himself, and another doth pull down or deface it; trespass *vi et armis* in such case doth not lie against him, because the freehold is in the parson, and so the only remedy is in the ecclesiastical court. *Wats. c.* 39. (*p*)

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(3) A lessee of an impropriator of great tithes canonically punished for breaking open the church door with intent to erect pews in the chancel. *Jarrat v. Steele,* 3 *Phill. R.* 167.

(*p*) Per *Buller J.* Trespass will not lie for entering into a pew, because the plaintiff has not the exclusive possession; the posses-

15. It is said, that in all cases of prescriptions for seats, the ordinary hath nothing to do; but the matter is solely determinable at the common law. *Degge, P.* 1. *c.* 12. **Rights to seats where triable.**

And therefore if a suit be commenced in the spiritual court for a seat, upon the account of prescription; a prohibition will lie for the party sued, because whether the prescription be good or not, is not in the spiritual court to judge. *Wats. c.* 39. (4)

And it is said that the plaintiff, if it go against him, may have a prohibition as to the costs; because the suit is *coram non judice* as to the principal: but there seem to be good reasons against that. For the spiritual court may in several cases proceed upon libels grounded on prescription, where the prescription is not denied (so that such suits are not absolutely *coram non judice*): and the reason why a prohibition shall be granted where the prescription or custom is denied, seemeth to be this; that the notion of customs and prescriptions is different by the ecclesiastical law from what it is at the common law, as to the time in which such custom or prescription may be created: for the ecclesiastical law allows of different times in creating customs or prescriptions, and generally of less time than is allowed of by the common law, which owns no time in such case, but that whereof there is no memory of man to the contrary. Therefore the common law will not suffer the spiritual courts to try prescriptions, whereby they might affect and charge persons' inheritances by adjudging them to be good, which by the common law are no prescriptions. *Wats. c.* 39.

But the title to a seat is properly triable at the common law, by action upon the case; and it is agreed, that the plaintiff need not to shew any reparation in his declaration, but he ought to prove reparation in evidence. *Wats. c.* 39. (*q*)

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sion of the church being in the parson. [*Stocks* v. *Booth*,] 1 *T. Rep.* 430., and the plaintiff having only the liberty to use the seat. 2 *Roll. Rep.* 139. *Dawtrie* v. *Dee*, *Palm.* 46. [Reported as *Dawney* v. *Dee*, *Cro. Jac.* 604. which was the case of a seat in an *ile*. See Mr. *Campbell*'s argument 2 *B.* & *A. Rep.* 504., and *ante* 361. *note* (*o*).] S. C. But an action on the case lies for a disturbance of the right. *Noy.* 78. 1 *Siderf.* 88. Sir *T. Jones*, 3. 3 *Keb.* 745. 1 *T. Rep.* 428.

(4) So where appendancy of a pew to an ancient house was pleaded in the court below. *Witcher* v. *Cheslam*, 1 *Wils. Rep.* 17. By the general law there can be no permanent property in pews. *Hawkins and Another* v. *Compeigne*, 3 *Phill. R.* 11.

(*q*) Per *Hale*, Ch. B., in *Stephen*'s case. And this is a probable reason for the prescription, for, per *Bridgman*, Ch. J. Although prescriptions resemble the river Nile in this respect that no one can trace their origin, so that no direct reason can be given for them, for they were before the memory of man; yet some probable reason,

Nevertheless, for a disturbance in the seat, a man may sue in the spiritual court; and the defendant, if he will, may admit the prescription to be tried there; as a defendant doth a modus, or a pension by prescription. [*Jacob* v. *Dallon*,] 2 *Salk.* 551. *L. Raym.* 755. [S. C.; and see *Clifford* v. *Wicks*, 1. *B.* & *A.* 498. *Cross* v. *Salter*, 3 *T. R.* 639. *supra*, 362, 363. *notis.*]

VIII. *Goods and ornaments of the church.*

Goods and ornaments in general.

1. By the 1. *El. c.* 2. Such ornaments of the church, and of the ministers thereof, shall be retained and be used, as was in the church of England, by authority of parliament, in the second year of the reign of king Edward the sixth, until *other order* shall be therein taken by the authority of the queen's majesty, with the advice of her commissioners appointed and authorised under the great seal of England, for causes ecclesiastical or of the metropolitan of this realm. § 25.

Other order] Pursuant to this clause, the queen in the third year of her reign granted a commission to the archbishop, bishop of London, Dr. Bill, and Dr. Haddon, to reform the disorders of chancels, and to add to the ornaments of them, by ordering the commandments to be placed at the east end. *Gibs.* 201.

And by the rubric before the common prayer: Such ornaments of the church, and of the ministers thereof, at all times of their ministration, shall be retained and be in use, as were in this church of England, by authority of parliament, in the second year of the reign of king Edward the sixth.

Ordinary's care therein.

2. *Reynolds.* The archdeacons shall take care, that the clothes of the altar be decent and in good order; that the church have fit books both for singing and reading; and at least two sacerdotal vestments. *Lind.* 52.

By the statute of *circumspecte agatis*, 13 *Ed.* 1. *st.* 4. The king to his judges sendeth greeting. Use yourselves circumspectly, in all matters concerning the prelates, where they do punish for that the church is *not conveniently decked:* in which cases, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.

Not conveniently decked] For the law alloweth the ecclesiastical court to have conusance in this case, of providing decent ornaments for the celebration of divine service. 2 *Inst.* 489.

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Churchwarden's care therein.

3. *Can.* 85. The churchwardens or questmen shall take care, that all things in the church be kept in such an orderly and decent sort, without dust, or any thing that may be either noisome or unseemly, as best becometh the house of God, and is prescribed in an homily to that effect. (r)

sufficient to make the prescription reasonable, ought to be given. 1 *Salk.* 293.

(r) See Churchwardens, 7.

4. *Can.* 82. Whereas we have no doubt, but that in all churches within the realm of England convenient and decent tables are provided and placed for the celebration of the holy communion; we appoint that the same tables shall from time to time be kept and repaired in sufficient and seemly manner, and covered in time of divine service with a carpet of silk or other decent stuff, thought meet by the ordinary of the place (if any question be made of it), and with a fair linen cloth at the time of the ministration, as becometh that table, and so stand, saving when the said holy communion is to be administered. At which time the same shall be placed in so good sort within the church or chancel, as thereby the minister may be more conveniently heard of the communicants in his prayer and ministration, and the communicants also more conveniently and in more number may communicate with the said minister. And all this to be done at the charge of the parish. **Communion table.**

In the case of *Newson* and *Bawldry*, *M.* 1 *An.* The case was, that the communion table of ancient time had been placed in the chancel; that there were ancient rails about it, which were out of repair; that the parishioners at a meeting had resolved to repair the chancel and rails, and to replace the table there, and raise the floor some steps higher, for the sake of greater decency. And upon refusal to pay the rate, and a prohibition prayed, the court inclined that the parishioners might do these things; for they are compellable to put things in decent order: and as to the degrees of order and decency, there is no rule, but as the parishioners by a majority do agree. *Far.* 70.

5. In ancient times, the bishops preached standing upon the steps of the altar. Afterwards it was found more convenient to have pulpits erected for that purpose. *Ayl. Par.* 21. **Pulpit.**

And by *Can.* 83. The churchwardens or questmen, at the common charge of the parishioners, in every church shall provide a comely and decent pulpit, to be set in a convenient place within the same, by the discretion of the ordinary of the place (if any question do arise); and to be there seemly kept for the preaching of God's word. [369]

6. *Can.* 82. And likewise a convenient seat shall be made at the charge of the parish, for the minister to read service in. **Reading desk.**

7. *Can.* 58. Every minister saying the public prayers, or ministering the sacraments or other rites of the church, shall wear a decent and comely surplice with sleeves, to be provided at the charge of the parish. And if any question arise touching the matter, decency, or comeliness thereof, the same shall be decided by the discretion of the ordinary. **Surplice.**

8. *Can.* 81. According to a *former constitution*, too much neglected in many places, we appoint, that there shall be a font of stone in every church and chapel where baptism is to be **Font.**

ministered; the same to be set in the ancient usual places: In which only font the minister shall baptize publicly.

Former constitution.] To wit, among the canons of 1571. *Gibs.* 360.

Chest for alms.

9. In an act in the 27 *H.* 8. for punishment of sturdy vagabonds, it was enacted, that money collected for the poor should be kept in the common coffer or box standing in the church of every parish.

And by *Can.* 84. The churchwardens shall provide and have, within three months after the publishing of these constitutions, a strong chest, with a hole in the upper part thereof, to be provided at the charge of the parish, (if there be none such already provided,) having three keys; of which one shall remain in the custody of the parson, vicar, or curate, and the other two in the custody of the churchwardens for the time being; which chest they shall set and fasten in the most convenient place, to the intent the parishioners may put into it their alms for their poor neighbours. And the parson, vicar, or curate, shall diligently, from time to time, and especially when men make their testaments, call upon, exhort, and move their neighbours to confer and give as they may well spare to the said chest; declaring unto them, that whereas heretofore they have been diligent to bestow much substance otherwise than God commanded, upon superstitious uses, now they ought at this time to be much more ready to help the poor and needy, knowing that to relieve the poor is a sacrifice which pleaseth God: and that also, whatsoever is given for their
[370] comfort, is given to Christ himself, and is so accepted of him, that he will mercifully reward the same. The which alms and devotion of the people, the keepers of the keys shall yearly, quarterly, or oftener (as need requireth), take out of the chest, and distribute the same in the presence of most of the parish, or of six of the chief of them, to be truly and faithfully delivered to their most poor and needy neighbours.

Basin for the offertory.

10. Whilst the sentences of the offertory are in reading, the deacons, churchwardens, or other fit person appointed for that purpose, shall receive the alms for the poor, and other devotions of the people, in a decent basin, to be provided by the parish for that purpose. *Rubr.*

This *offertory* was anciently an oblation for the use of the priest; but at the reformation it was changed into alms for the poor. *Ayl. Par.* 394.

Chalice and other vessels for the communion.

11. *Can.* 20. The churchwardens, against the time of every communion, shall, at the charge of the parish, with the advice and direction of the minister, provide a sufficient quantity of fine white bread and of good and wholesome wine; which wine we require to be brought to the communion table, in a clean and sweet standing pot, or stoop of pewter, if not of purer metal.

Winchelsea. The parishioners shall find, at their own charge the chalice or cup for the wine. *Lind.* 252.

Which, says *Lindwood*, although expressed in the singular number, yet is not intended to exclude more than one, where more are necessary. *Lind.* 252.

12. *Winchelsea.* The parishioners, at their own charge, shall find bells with ropes. *Lind.* 252. Bells.

13. *Winchelsea.* The parishioners shall find, at their own charge, a bier for the dead. *Lind.* 252. Bier.

14. *Can.* 80. If any parishes be yet unfurnished of the Bible of the largest volume; the churchwardens shall, within convenient time, provide the same at the charge of the parish. Bible.

Bible of the largest volume] This was directed by the second of lord Cromwell's injunctions under king Henry the eighth; and in the thirty-third year of the same reign, it was inforced by proclamation and a penalty of 40*s.* The like order for this, and also for the paraphrase of Erasmus, was in the injunctions of Ed. 6. and continued in those of queen Elizabeth; and (together with the book of homilies) in the canons of 1571. But what Bible is here meant, by that of the *largest volume*, is not very clear. King James the first's translation was not then made. Queen Elizabeth's Bible was called the *bishop's Bible;* and the translations [371] and reviews, commonly called the *great Bible*, were those of Tindal and Coverdale in the time of king Henry the eighth, and that which was published by direction of archbishop Cranmer in the reign of Edward the sixth. *Gibs.* 202.

15. By *Can.* 80. The churchwardens or questmen of every church and chapel shall, at the charge of the parish, provide the book of common prayer, *lately explained* in some few points by his majesty's authority according to the laws and his highness's prerogative in that behalf; and that, with all convenient speed, but at the farthest within two months after the publishing of these our constitutions. Common prayer book.

Lately explained] To wit, in the conference at Hampton court. *Gibs.* 226.

By the 1 *El.* c. 2. The book of common prayer shall be provided at the charge of the parishioners of every parish and cathedral church. § 19.

By the 13 & 14 *C.* 2. c. 4. A true printed copy of the (present) book of common prayer shall, at the costs and charges of the parishioners of every parish church and chapelry, cathedral church, college, and hall, be provided before the feast of St. Bartholomew, 1662, on pain of 3*l.* a month for so long time as they shall be unprovided thereof. § 2.

16. *Can.* 80. If any parishes be yet unfurnished of the book of homilies allowed by authority; the churchwardens Book of homilies.

shall within convenient time provide the same at the charge of the parish.

Register Book. 17. By *Can.* 17. In every parish church and chapel shall be provided one parchment book at the charge of the parish, wherein shall be written the day and year of every christening, wedding, and burial within the parish; and for the safe keeping thereof, the churchwardens at the charge of the parish shall provide one sure coffer, with three locks and keys, whereof one to remain with the minister, and the other two with the churchwardens severally: [and see tit. Register.]

[372] See now 4 *Geo.* 4. *c.* 76. *s.* 6. infra, tit. Marriage, VIII., and 52 *Geo.* 3. *c.* 146. tit. Register Book.

Table of degrees. 18. *Can.* 99. The table of degrees of marriages prohibited, shall be in every church publicly set up at the charge of the parish.

Ten commandments. 19. *Can.* 82. The ten commandments shall be set at the charge of the parish, upon the east end of every church and chapel, where the people may best see and read the same.

Sentences. 20. *Can.* 82. And other chosen sentences shall at the like charge be written upon the walls of the said churches and chapels, in places convenient.

Monuments. [See Burial, 1. and 12.] 21. Lord *Coke* says, [3 *Inst.* 102.], concerning the building or erecting of tombs, sepulchres, or monuments for the deceased, in church, chancel, common chapel, or churchyard, in convenient manner; it is lawful: for it is the last work of charity that can be done for the deceased; who whilst he lived was a lively temple of the Holy Ghost, with a reverend regard and Christian hope of a joyful resurrection.

But Sir *Simon Degge* says, he conceives that this must be intended, by licence of the bishop, or consent of the parson and churchwardens. *Degge, P.* 1. *c.* 12.

And Dr. *Watson* says, this is to be understood of such monuments only, as are set up in the iles belonging to particular persons; or if they are set up in any other part of the church, he supposes it is to be understood, that they were placed there with the incumbent's consent. *Wats. c.* 39.

This, as bishop *Gibson* conceives, is to be understood with one limitation; if they were first set up with consent of the ordinary: for though (as my lord *Coke* says) tombs, sepulchres, or monuments may be erected for the deceased in church or chancel in convenient manner, the ordinary must be allowed the proper judge of that conveniency; inasmuch as such erecting, as he addeth, ought not to be to the hindrance of the celebration of divine service. And if they are erected without consent, and upon inquiry and inspection be found to the hindrance of divine service, he thinks it will not be denied, that in such case the ordi-

nary hath sufficient authority to decree a removal, without any danger of an action at law. *Gibs.* 453, 454. (5)

And lord *Coke* saith, that the building or erecting of the sepulchre, tomb, or other monument, ought not to be to the hindrance of the celebration of divine service. 3 *Inst.* 202.

And the defacing of them is punishable by the common law, as it appeareth in the book of the 9 *Ed.* 4. 14. the lady *Wiche's* case, wife of Sir Hugh Wiche; and so it was agreed by the whole court, *M.* 10 *J.* in the common pleas, between *Corven* and *Pym.* And for the defacing thereof, they that build or erect the same shall have the action during their lives (as the lady Wiche had in the case of the 9 *Ed.* 4.); and after their deceases, the heirs of the deceased [by descent interested in the coat, *Cro. Jac.* 367.] shall have the action. (6)

(5) Thus a custom for the churchwardens of a parish to set up monuments, &c. in a church, without consent of rector or ordinary, is illegal. *Beckwith* v. *Harding*, 1 *B. & A.* 508. There seems at common law no right to erect even a flat grave-stone for mere protection of the grave in a church *yard*, without legal authority of the ordinary, except a custom that the churchwardens shall give leave for that purpose be shewn to obtain. *Bardin* v. *Calcott*, 1 *Hagg. Rep.* 14—20. MSS. *Cas.* 81. The proper course where no custom exists is, to apply to the ordinary specifying the dimensions of the proposed tombstone, &c. (*Bardin* v. *Calcott*); the ordinary then calls on all persons pretending to have any right, to appear in his court, to shew whether any and what objections can be made to it. No prohibition lies where the objections of the party dissenting are improperly overruled in the consistorial court: it is mere matter of appeal. *Bulwer (clerk)* v. *Hase*, 3 *East's Reports*, 217. and *Cart* v. *Marsh*, *Stra.* 1080. (*See the text.*) The authority as to erecting buildings of greater height than necessary (*e. g.* as a flat stone), for mere protection of the grave, is reserved to the ordinary, as paramount to any custom similar to the above: and permission ought not to be granted without his authority in some manner interposed. *Semb.* 1 *Hagg.* 14. But monuments once erected may be repaired, for this is of public consequence, when their importance in tracing family descents, &c. is considered. It may be proper to apply to the churchwardens for leave to do so: but they are bound to grant it, as far as their authority extends; and if they do not, will be liable to the censure of the ecclesiastical court. If parties are not at liberty to repair, the object of obtaining leave to erect would be defeated: it is rather the duty of churchwardens to encourage parishioners to provide that monuments may be put in repair, than to obstruct others in doing it; for decency and propriety require that they should not remain in a state of ruin and decay. *Bardin* v. *Calcott*. Thus the churchwardens may bring an action for defacing a monument. *Godbolt.* 279.

(6) For the heir by descent is inheritable to arms as to heirlooms. 30 *Ed.* 3. 2. 39 *Ed.* 3. 14.

For grave-stones (he says), winding sheets, coats of arms, penons, or other ensigns of honour, hanged up, laid, or placed in memory of the dead, the property remains in the executors; and they may have actions against such as break, deface, or carry them away, or an appeal of felony. 3 *Inst.* 110. [*Co. Lit.* 18 *b.*]

[Again, lord *Coke* says, if a nobleman, knight, esquire, or other, be buried in a church, and have his coat armour and penons, with his arms, and such other ensigns of honour as belong to his degree or order, set up in the church, or if a grave-stone or tomb be laid or made for a monument of him; in this case, although the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson, or any other, take them or deface them; but he is subject to an action to the heir and his heirs, in the honour and memory of whose ancestor they were set up. 1 *Inst.* 18 *b.*]

Dr. *Gibson* saith, monuments, coat armour, and other ensigns of honour, set up in memory of the deceased, may not be removed at the pleasure of the ordinary or incumbent. On the contrary, if either they or any other person shall take away or deface them, the person who set them up shall have an action against them during his life, and after his death the heir of the deceased shall have the same, who (as they say) is inheritable to arms, and the like, as to heir looms; and it availeth not that they are annexed to the freehold, though that is in the parson.

M. 10 *G. Palmer* against the *Bishop of Exeter.* Sir Thomas Bury set up his arms in the church of St. David's in Exeter. The ordinary promotes a suit in the spiritual court, to deface them, as being set up without his consent. It was moved for a prohibition; on the authorities that action lies by the heir for defacing the monument of his ancestor: But *Eyre* and *Fortescue*, justices, said, the ordinary was judge what ornaments were proper, and might order them to be defaced. The same was afterwards moved in the court of common pleas, and denied there also. *Str.* 576.

For the ordinary is the proper judge about erecting monuments, or putting up other ornaments in the church: yet nevertheless, notwithstanding his allowance, an appeal lies to the metropolitan. As in the case of *Cart* and *Marsh*, *M.* 11. *G.* 2. A dispute arose between the parties, upon cross petitions exhibited to the archdeacon of Bedford and commissary of the
[374] bishop of Lincoln, for leave to erect a monument against a pier in Dunstable church, to the memory of their respective ancestors. And upon allegations given in on both sides, Marsh appealed to the arches, against the admission of Cart's allegation. Upon which Cart moved for a prohibition; insisting, 1. That ornaments are discretionary only in the ordinary, and therefore no appeal would lie. Or, 2. If it did, yet it must be to the bishop of

Lincoln, and not to the arches. But the court held, that though ornaments cannot be set up without the consent of the ordinary; yet it must be exercised according to a prudent and legal discretion, which the superior hath a right to look into and correct; and therefore the appeal well lay, as it doth in cases of granting administration to one, where there are two in equal degree. And as to its being an appeal to the arches, it was held, that whenever the act is done by a commissary, it is considered as the act of the ordinary himself; and to him no appeal will lie from his own act, and it must consequently be to the metropolitan. So the rule for a prohibition was discharged. *Str.* 1080. (*s*)

Images.

22. If any superstitious pictures are in a window of a church or ile, it is not lawful for any to break them without licence of the ordinary: and in *Pricket*'s case, Wray, chief justice, bound the offender to the good behaviour. *Cro. Jac.* 366.

Other goods and ornaments.

23. Besides what hath been observed in particular, there are many other articles for which no provision is made by any special law, and therefore must be referred to the general power of the churchwardens, with the consent of the major part of the parishioners as aforesaid, and under the direction of the ordinary; such as the erecting galleries, adding new bells (and of consequence, as it seemeth, salaries for the ringers), organs, clock, chimes, king's arms, pulpit cloths, herse cloth, rushes, or mats, vestry furniture, and such like. (*t*)

(*s*) *Bulwer* v. *Hase*. In this case the plaintiff applied for a prohibition to the consistorial court of Norwich, the object of which was, to restrain the ordinary from granting a faculty to the defendant for stopping up a certain window in the parish church of Sall in Norfolk (of which the plaintiff was rector), for the purpose of erecting a monument to the memory of his wife. The court of K. B. held, that if the rector's reasons for dissenting were improperly overruled, it was no ground for a prohibition, but a mere matter of appeal. 3 *East's Rep.* 217.

(*t*) In *Butterworth and Barker* v. *Walker and Waterhouse*, 3 *Bur.* 1689, it seems to have been the opinion of the court of K. B. that the consent of the parish is not necessary to the ordinary's ordering an organ [provided by subscription] to be erected in a church; but the parish cannot, without their consent, be charged with the expence of erecting or repairing it, or adding new ornaments. Nor can the consent of a *select* vestry bind the parish without immemorial usage. [But see select vestry act, tit. Vestry.] In this case, the organ being provided for by voluntary contribution, a prohibition was denied. In the case of *The Churchwardens of St. John's Margate*, v. *The Parishioners, Vicar, &c. of the same*, 1 *Hagg.* 198, lord *Stowell* declared that the law respecting church ornaments is now generally understood and settled. The consent of the parishioners is not indispensably necessary, unless to charge the parish with any expence for support of the ornament after it has been put up. But if there is no

There are also, besides these, by an ancient constitution of archbishop Winchelsea, divers other particulars enjoined to be found at the charge of the parish, which since the reformation are become for the most part obsolete; but nevertheless, as they frequently occur in our books, it may be proper not to pass them altogether unnoticed. Which constitution is thus:

The parishioners shall find at their own charge these several things following: a *legend*, an *antiphonar*, a *grail*, a *psalter*, a *troper*, an *ordinal*, a *missal*, a *manual*, the *principal vestment*, with a *chesible*, a *dalmatic*, a *tunic*, with a *choral cope, and all its appendages*, a *frontal for the great altar*, with *three towels, three surplices, one rochet*, a cross for processions, *cross for the dead*, a censer, a lanthorn, an hand-bell to be carried before the body of Christ in the visitation of the sick, a *pix* for the body of Christ, a decent veil for lent, banners for the rogations, a vessel for the blessed water, an *osculatory*, a candlestick for the taper at Easter, a font with a lock and key, the *images* in the church, *the chief image in the chancel*, the reparation of the body of the church within and without, as well in the images as in the glass windows, the reparation of books and vestments whenever they shall need. *Lindw.* 251.

Legend] The book containing lessons to be read in the public service, taken out of the holy scripture, the lives of saints, the writings of the ancient fathers and other doctors of the church. *Lindw.* 251.

Antiphonar] From *αντι contra*, and *φωνη sonus*; so called from the alternate repetition of the psalm; one part thereof being sung by one part of the choir, and the other part thereof by the other part of the choir: And it contained not only the *antiphonæ*, as the word barely signifies, but also the invitatories, hymns, responsories, verses, collects; and whatever was said or sung in the choir, called the seven hours, or breviary, except the lessons. *Lindw.* 251.

Grail] Gradale; strictly taken, this signifieth that which is sung *gradatim* after the epistle: but here it is to be understood of that whole book which containeth all that was to be sung by the quire at high mass; the tracts, sequences, hallelujahs, the

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charge incurred, the approbation of the majority of the parishioners is not necessary, nor the disapprobation binding on the ordinary. He then decreed a faculty for accepting and erecting an organ offered to the church of St. John's, Margate, without a clause against future expences being charged to the parish, which was rich and populous. In cathedrals organs may be deemed necessary, and the ordinary may compel their erection by the dean and chapter. In parish churches it is otherwise; and it might be proper to discourage them in small or poor parishes.]

creed, offertory, trisagium, and the rest; as also the office for sprinkling the holy water. *Lindw.* 251.

Psalter] The book wherein the psalms are contained. *Lindw.* 251.

Troper] This contained the sequences only; which were not in all grails. The sequences were devotions used after the epistle. *Lindw.* 251. [376]

Ordinal]. The book which *ordereth* the manner of performing divine service: and seemeth to be the same which was called the *pie*, or *portuis*, and sometimes *portiforium*. *Lindw.* 251. *Johns. Winch.*

Missal] The book which containeth all things pertaining to the saying of mass. *Lindw.* 251.

Manual] So called *a manu*, as being required to be constantly at hand; and it seemeth to be the same as the *ritual;* and containeth all things belonging to the ministration of the sacraments and sacramentals; also the blessing of fonts, and other things by the use of the church requiring benediction: and the whole service used at processions. *Lindw.* 251.

Principal vestment] That is, the best cope to be worn on the principal feasts. *Lindw.* 252.

Chesible] Casula; the garment worn by the priest, next under the cope: which was called also the *planet.* And it is said to be so called, as being a kind of *cottage* (as it were), or little house, covering him all over. *Lindw.* 252.

Dalmatic] A deacon's garment; so called, from being at first woven in Dalmatia. *Lindw.* 252. *Johns. Winch.*

Tunic] The subdeacon's garment, which he useth in serving the minister at the mass. *Lindw.* 252.

Choral cope] *Capa in choro:* a cope, not so good as that to be used on festivals, but to be worn by the priest who presided at the saying or singing the hours. *Johns.*

The *capa* was so called *a capiendo*, because it containeth or covereth the whole man. *Lindw.* 252.

And all its appendages] To wit, the amyt, alb, girdle, maniple, and stole. *Lindw.* 252.

Frontal] A square piece of linen cloth covering the altar, and hanging down from it; otherwise called a *pall. Lindw.* 252.

For the great altar] In honour of the saint to whom the church is dedicated; which was wont to be placed in the choir, as in a more solemn part of the church. *Lindw.* 252.

Three towels] Two to be laid upon the altar under the corporal; and the third for wiping the hands. *Lindw.* 252.

Three surplices] For the use of the three ministers of the church; the priest, deacon, and subdeacon. *Lindw.* 252.

Rochet] Rochet is a surplice, save that it has no sleeves; and [377] was for the clerk who assisted the priest at the mass; or for

the priest when he baptized children, that his arms might be more at liberty. *Lindw.* 252.

A cross for the dead] To be laid on the coffin, as it seemeth; or on the corpse when it was brought to the church. *Johns.*

Pyx] With a lid or cover. *Lindw.* 252.

Osculatory] This was a tablet or board, with the picture of Christ, the Blessed Virgin, or the like; which the priest kissed himself, and gave to the people for the same purpose, after the consecration was performed, instead of the ancient kiss of charity. *Johns.*

Images] To wit, of Christ crucified, and of other saints. *Lindw.* 253.

The chief image in the chancel] That is, of the saint to whom the church is dedicated. *Lindw.* 253.

Who hath the property in the goods of the church.

24. A person may give or dedicate goods to God's service in such a church, and deliver them into the custody of the churchwardens, and thereby the property is immediately changed. *Degge, P.* 1. *c.* 12.

And if a man erect a pew in the church, or hang up a bell in the steeple, they do thereby become church goods (though they are not expressly given to the church), and he may not afterwards remove them; if he does, the churchwardens may sue him.

The soil and freehold of the church and churchyard is in the parson; but the fee-simple of the glebe is in abeyance. 1 *Inst.* 341. And if the walls, windows, or doors of the church be broken by any person, or the trees in the churchyard be cut down, or grass there be eaten up by a stranger; the incumbent of the rectory (or his tenant if they be let) may have his action for the damages. *Wats. c.* 39.

But the goods of the church do not belong to the incumbent, but to the parishioners; and if they be taken away, or broken, the churchwardens shall have their action of trespass at the common law. *Wats. c.* 39. As in the case of *Bucksal, T.* 12 *J.* But whereas it is there said, that suit shall not be therefore in the spiritual court; a later judgment (*E.* 18 *C.* 2.) says, that though the churchwardens had an action at common law, against those who had taken away the bells, yet the more proper remedy was in the spiritual court, because at the common law only damages would be recovered, but the spiritual court would

[378] decree the restoring of the thing itself. (*u*) 1 *Roll's Rep.* 57. 1 *Sid.* 281. *Gibs.* 206.

(*u*) [*Walcombe* v. *Jaley*, 2 *Keb.* 22. 1 *Sid.* 281. Distinguished in *Gardner* v. *Parker*, 3 *T. R.* 851.] And in a late case, prohibition was granted to stay a suit in the spiritual court for taking away two bells out of the steeple; for the churchwarden is a corporation, and the property is in him, and he may bring *trover* at common law. 2 *Salk.* 547. *Starky* v. *Churchwardens of Watlington.* See Churchwardens, 7.

By the civil law, the goods belonging to a church are forbidden to be alienated or pawned, unless for the redemption of captives, for relief of the poor in time of great famine and want, or for paying the debts of the church; if a supply cannot be otherwise raised; or upon other cases of necessity or great advantage to the church. And in every alienation the cause must be first examined, and the decree of the prelate intervene, with the consent of the whole clergy or chapter. *Wood. Civ. L.* 142.

But by the laws of England, the goods belonging to a church may be aliened; yet the churchwardens alone cannot dispose of them, without the consent of the parish: and a gift of such goods by them without the consent of the sidemen or vestry is void. *Wats. c.* 39.

IX. *Church rate.*

Rate to be made at a vestry meeting.

1. Rates for reparation of the church are to be made by the churchwardens, together with the parishioners assembled upon public notice given in the church. (7) And the major part of them that appear shall bind the parish: or if none appear, the churchwardens alone may make the rate; because they, and not the parishioners, are to be cited and punished, in defect of repairs. But the bishop cannot direct a commission, to rate the parishioners, and appoint what each one shall pay: this must be done by the churchwardens and parishioners; and the spiritual court may inflict spiritual censures till they do. *Gibs.* 196. 1 *Bac. Abr.* 378. (8)

But if the rate be illegally imposed, by such commission

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(7) When in a suit brought by the churchwardens for a church rate the plea was, that it was made at a vestry held without due notice, it was shewn and admitted that some notice had been given, a vestry held, and its proceedings confirmed at subsequent vestries; but the notice itself appeared only to be, "that the chiefs of the parish were desired to meet after service." The court, under a very doubtful proof of such notice, after a lapse of three years, and no suggestion of impropriety of conduct in the officers, or in the rate itself, held the notice to be sufficient. *Semble.*—However expedient and proper this rule may be, there is no authority deciding that notice must be given of the specific purpose for which a vestry is to be called. *Clutton v. Cherry,* 2 *Phill. Rep.* (*Arches*) 373.

(8) *Pierce v. Prowse, ante,* 349, *note.* And the court of chancery refused to compel a church rate for the purpose of reimbursing a churchwarden, where he had neglected to obtain one previous to incurring the expences. *Lanchester v. Thompson and others,* 5 *Madd. Rep.* 4. So the spiritual court, though it may compel a rate to repair, cannot so reimburse. *Ibid.* So at law. *Dawson v. Wilkinson, Rep. temp. Hardw.* K. B. 381. *Andrews,* 11.

from the bishop, or otherwise, without the parishioners consent; yet if it be after assented to, and confirmed by the major part of the parishioners, that will make it good. *Wats.* c. 39.

Personal charge in respect of the land.

2. And these levies are not chargeable upon the land, but upon the person in respect of the land, for the more equality and indifferency. *Degge, P.* 1. *c.* 12.

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And houses as well as lands are chargeable, and in some places houses only; as in cities and large towns where there are only houses, and no lands to be charged. *Hetl.* 130. 2 *Lutw.* 1019.

Whether there shall be two rates; one for the fabric, and another for ornaments.

3. It hath been said, that if a person be rated for the ornaments of the church, according to his land which he hath in the parish, a prohibition lieth; because for these he ought to be rated according to his personal estate. 2 *Roll's Abr.* 291.

And that if a person who is not an inhabitant within the parish, but hath land there, is rated there for the ornaments of the church according to his land, a prohibition lieth: for the inhabitants ought to be rated for them. *M.* 20 *J.* And *Yelverton* said, that this had been divers times so resolved. 2 *Roll's Abr.* 291.

And *Lindwood* says, that persons living out of the parish, and having lands within the parish, shall be rated for the same in respect of real but not of personal charges; and for this he refers to several passages in the civil law. *Lindw.* 255.

And Dr. *Gibson* says, a rate for the reparation of the fabric of the church is real, charging the land, and not the person; but a rate for ornaments is personal, upon the goods, and not upon the land. Thus it was defined and agreed in the court of king's bench, *E.* 8 *Jac.*, where the tax was, for the reparation of the church, for church ornaments, and for sexton's wages; and because the person rated, though an occupier of land in the parish, dwelt out of it, he was declared to be unduly rated in the two last articles; and it was further agreed, that if a tax be made for the reparation of seats in a church, a foreigner shall not be taxed for that, because he hath no benefit by them in particular. The same distinction, as to ornaments, was again declared to be good, *M.* 20 *Jac.* And long after these, in *Woodward's* case, in the 4 *Ja.* 2., where the matter was a tax for the bells of the church, a prohibition was granted, upon this suggestion, that the party who prayed it was not an inhabitant of the parish; and the court gave for reason, because it is a personal charge to which the inhabitants alone are liable, and not those who only occupy in that parish, and live in another. *Gibs.* 196.

But upon trial of the same case, upon the prohibition, *T.* 1 *W.*, it was determined, that Woodward, although he lived in another

parish, was liable: as will appear afterwards. [*viz.* 1 *Salk.* 164. *infra*, p. 382.]

And Sir *Simon Degge* says thus: There hath been some question made, whether one that holds lands in one parish, and resides in another, may be charged to the ornaments of the parish where he doth not reside; and some opinions have been, that foreigners were only chargeable to the shell of the church, but not to bells, seats, or ornaments. But he says, he conceives the law to be clear otherwise; and that the foreigner that holds lands in the parish, is as much obliged to pay towards the bells, seats, and ornaments, as to the repair of the church; otherwise there would be great confusion in making several levies, the one for the repair of the church, the other for the ornaments, which he says he never observed to be practised within his knowledge. And it is possible that all, or the greatest part of the land in a parish, may be held by foreigners: and it were unreasonable in such case to lay the whole charge upon the inhabitants, which may be but a poor shepherd. The reason alleged against this charge upon the foreigners, is chiefly because the foreigner hath no benefit by the bells, seats, and ornaments; which receives an answer in *Jeffrey's* case (5 *Co.* 67.), for there it is resolved, that landholders that live in a foreign parish are in judgment of law inhabitants and parishioners, as well in the parish where they hold lands, as where they reside; and may come to the parish meetings, and have votes there as well as others. For authorities in the case, it is clear by the canon law, that all landholders, whether they live in the parish or out of it, are bound to contribute. And he hath seen (he says) a report under the hand of Mr. *Latch*, that it was resolved in *Willymott's* case, *H.* 6 *Ja.*, and in *Chester's* case in the 10 *Ja.*, that a foreigner that held lands in another parish, wherein he did not reside, was as much chargeable to the ancient ornaments of the church, as bells, seats, and the like, as those that lived in the parish; but that such landholders could not be charged to new bells, organs, or such like. And Mr. *Bulstrode* (1 *Bulstr.* 20.) reports a case about the same time, that the chief justice *Fleming* and Mr. justice *Williams* were of the same opinion, and gave this reason, that the foreigner might come to the church if he pleased. *Degge, P.* 1. c. 12. [380]

And the practice, for the ease and convenience thereof, seemeth now generally to go with this latter opinion.

To be charged with equality as indifference.

4. If a parish plead a custom for it to be laid only for lands, and not for houses; or to be laid only for arable lands, and to be excused for their pastures; or to be laid only for their sheep walks, and not for the rest; the custom cannot be good: for by the law, all lands and houses are to be equally rated; and [381]

their paying for some part, can be no good cause for the discharge of the rest. *Hetl.* 130. *Latch*, 203.

Stratford. All persons, as well religious as others whatsoever, having possessions, farms, or rents, *which are not of the glebe or endowment of the churches to be repaired*, living within the parish or elsewhere, shall be bound to contribute *with the rest of the parishioners* of the aforesaid churches, as often as shall be needful, to all charges incumbent upon the parishioners, concerning *their church* and the ornaments thereof, by law or custom; *having respect unto the quantity of such possessions* and rents. Whereunto, so often as shall be necessary, the ordinary shall compel them by ecclesiastical censures and other lawful means. *Lindw.* 255.

Which are not of the glebe or endowment of the churches to be repaired] Therefore if such lands be of the glebe or endowment of the churches, he who is tenant of the lands ought not to contribute to such repairs or ornaments. *Lindw.* 255.

Of the churches to be repaired] From hence it appeareth, that if there be lands within the parish belonging to another church, and which are of the glebe or endowment of such other church; yet they who have such lands ought to contribute to the repairs and ornaments of the church of that parish, within which parish such lands do lie. *Lindw.* 255.

With the rest of the parishioners] This implieth, that they who live out of the parish, and have lands within the parish, ought to be rated amongst the parishioners of that parish where the lands lie. *Lindw.* 255.

Their church] To wit, the building, repairing, or other sustentation thereof. *Lindw.* 255.

Having respect unto the quantity of such possessions] Which ought to be estimated according to the value of the rent. *Lindw.* 255.

Lands lying in another parish.

5. If a person inhabiteth in one parish, and hath land in another parish, which he occupieth himself there, he shall be charged for this land, for the reparation of the church of the parish in which the land lieth; because he may come there when he will, and he is to be charged in respect of the land. 2 *Roll's Abr.* 289.

But a person cannot be charged in the parish where he inhabiteth, for land which he hath in another parish, to the reparation of that church where he inhabiteth; for then he might be twice charged: for he may be charged for this in the parish where the land lieth. 2 *Roll's Abr.* 289.

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And therefore the rate shall be laid upon all lands within the parish, although the occupiers inhabit in another parish: Which point was first fully settled in *Jeffrey's* case, *M.* 31 & 32 *El.* (5 *Co.* 66.); where it was also resolved (pursuant to the opinion

of divers civilians under their hands), that such occupation of land maketh the person occupying *a parishioner*, and entitles him to come to the assemblies of the same parish, when they meet together for such purposes; and it was said, that if such lands were not liable to be rated, a person who inhabiteth in one parish might occupy the greatest part of the lands in another parish, and so churches might come to ruin. And although seven years after this, in the case of *Paget* and *Crumpton* (*Cro. El.* 659.), a prohibition was obtained upon a surmise, that the person rated lived not in the parish; yet upon sight of this precedent, *Popham* chief justice changed his opinion, and it was resolved by him and the whole court, that a consultation should be granted; and now (lord *Coke* says) this is generally allowed and received for law. *Gibs.* 196.

T. 1 *W.*, *Woodward* and *Makepeace.* Woodward, who lived in the diocese of Litchfield and Coventry, but occupied lands in the parish of D. in the diocese of Peterborough, was in the said parish of D. taxed in respect of his land, as an inhabitant, towards a rate for new-casting of the bells; and because he refused to pay, was cited into the court of the bishop of Peterborough, and libelled against for this matter. And by the court, This is not a citing out of the diocese within the statute of the 32 *H.* 8. *c.* 9.; for he is an inhabitant where he occupies the land, as well as where he personally resides: Secondly, that although he doth not personally live in the parish, yet by having lands in his hands he is taxable: And whereas it was pretended, that the bells were but ornaments, it was held that they were more than mere ornaments: that they were as necessary as the steeple, which is of no use without the bells; and *Holt* chief justice said, if he be an inhabitant as to the church, which is confessed, how can he not be an inhabitant as to the ornaments of the church? 1 *Salk.* 161.

Tenant to be charged, and not the lessor.

6. Where such lands are in farm; not the lessor, but the tenant shall pay. For (as it was determined in *Jeffrey's* case * before cited) there is an inhabitant and parishioner who may be charged; and the receipt of the rent doth not make the lessor a parishioner. *[383] And so it was resolved in the 4 *W.* (4 *Mod.* 148.), where a libel was in the spiritual court, for not paying a rate; and the suggestion in order to a prohibition was, that the lands were in the occupation of his tenant, and himself was not a parishioner; and it was held to be a good suggestion, and that the tenant should be charged, and not the owner. *Gibs.* 197.

In what case the founder of a church may be exempted.

7. It is said, that the patron of a church, as in right of the founder, may prescribe, that in respect of the foundation, he and his tenants have been freed from the charge of repairing the church. *Degge, P.* 1. *c.* 12.

Rectory how far exempted.

8. The rectory or vicarage which is derived out of it, are not chargeable to the repair of the body of the church, steeple, public chapels, or ornaments; being at the whole charge of repairing the chancel. *Degge*, *P.* 1. *c.* 12.

But an impropriator of a rectory or parsonage, though bound to repair the chancel, is also bound to contribute to the reparations of the church, in case he hath lands in the parish which are not parcel of the rectory. This was judged by the whole court in serjeant *Davie's* case, without any question made of it. *Gibs.* 197.

Inhabitants of a chapelry how far exempted.

9. The inhabitants of a precinct where is a chapel, though it is a parochial chapel, and though they do repair that chapel, are nevertheless of common right contributory to the repairs of the mother church. If they have seats at the mother church, to go thither when they please, or receive sacraments, or sacramentals, or marry, christen, or bury at it, there can be no pretence for a discharge. Nor can any thing support that plea, but that they have time out of mind been discharged (which also is doubted whether it be of itself a full discharge); or that in consideration thereof they have paid so much to the repair of the church, or the wall of the churchyard, or the keeping of a bell, or the like compositions (which are clearly a discharge). *Gibs.* 197.

Dr. *Godolphin* says, it is contrary to common right, that they who have a chapel of ease in a village should be discharged of repairing the mother church; for it may be that the church, being built with stone, may not need any reparation within the memory of man: and yet that doth not discharge them, without some special cause of discharge shewed. *God.* 153.

[384]

Hall of a company.

10. The hall of a company being rated to the repairs of a church, the spiritual court in case of non-payment may proceed against the master and wardens of such company. For the hall is liable to pay, and they cannot proceed otherwise than by citation; which may be executed upon an aggregate corporation; and therefore the officers of the corporation are to be cited; and the rate paid by them is to be allowed in their accounts. *T. Jones*, 187.

Stall in a market.

11. If a petty chapman take a standing, for rent to be paid by him, in the waste of the manor within the market, for two or three hours every market day, to sell his commodities, the market being holden there one day every week, but he inhabiteth in another parish; he may not be rated to the reparation of the church for this standing. 2 *Roll's Abr.* 289.

Manner of laying the assessment. (9)

12. An order and direction set down by Dr. King, Dr. Lewen, Dr. Lynsey, Dr. Hoane, Dr. Sweite, Dr. Steward, and others, doctors of the civil law, to the number of thirteen in all,

(9) If a parish consists of several vills, and there is a custom to levy the rate in certain proportions, they must pursue it, whether reasonable or not. *Burton* v. *Wileday*, *Andrews*, 32.

assembled together in the common dining-hall of Doctors' Commons in London, touching a course to be observed by the assessors in their taxations of the church and walls of the churchyard of Wrotham in Kent; and to be applied generally, upon occasion of like reparations, to all places in England whatsoever:

(1) Every inhabitant dwelling within the parish is to be charged according to his ability, whether in land or living within the same parish, or for his goods there; that is to say, for the best of them, but not for both.

(2) Every farmer dwelling out of the parish, and having lands and living within the said parish in his own occupation, is to be charged to the value of the same lands or living, or else to the value of the stock thereupon; even for the best, but not for both.

(3) Every farmer dwelling out of the parish, and having lands and living within the parish, in the occupation of any farmer or farmers, is not to be charged; but the farmer or farmers thereof are to be charged in particularity, every one according to the value of the land which he occupieth, or according to the stock thereupon; even for the best, but not for both.

(4) Every inhabitant and farmer occupying arable land within the parish, and feeding his cattle out of the parish, is to be charged for the arable lands within the parish, although his cattle be fed out of the parish.

(5) Every farmer of any mill within the parish, is to be charged for that mill; and the owner thereof (if he be an inhabitant) is to be charged for his hability in the same parish, besides the mill. [385]

(6) Every owner of lands, tenements, copyholds, or other hereditaments, inhabiting within the parish, is to be taxed according to his wealth in regard of a parishioner, although he occupy none of them himself; and his farmer or farmers also are to be taxed for occupying only.

(7) The assessors are not to tax themselves, but to leave the taxation of them to the residue of the parish. *God. Append.* 10, 11.

13. The form of the church rate may be this;

Form of the assessment.

"We the churchwardens and other parishioners of the parish "of ——— in the county of ——— and diocese of ——— "whose names are hereunto subscribed, do hereby this ——— "day of ——— in the year ——— at our vestry meeting for "that purpose assembled, rate and tax all and every the inha- "bitants and parishioners of the parish aforesaid, here under "mentioned, for and towards the repairs of the church of the "said parish for this present year, the several sums follow- "ing, viz.

				£.	s.	d.
A. B.	——	——	——	1	2	0
C. D.	——	——	——	0	3	0
E. F.	——	——	——	0	2	6

And so on.

A. B. }
C. D. } Churchwardens.

E. F. }
G. H. }
I. K. } Parishioners.
&c. }

Appeal against the assessment.

14. And if any person find himself aggrieved at the inequality of any such assessment, his appeal is to the ecclesiastical judge, who is to see right done. *Degge, P.* 1. *c.* 12.

Levying the assessment.

15. And if any of the parishioners refuse to pay their rates, being demanded by the churchwardens, they are to be sued for, and to be recovered in the ecclesiastical courts, and not elsewhere. *Degge, P.* 1. *c.* 12.

[386] For the cognizance of rates made for the reparation of churches and churchyards belongs to the spiritual court. (10) This is in consequence of the foregoing statute of the 13 *Ed.* 1. concerning repairs as of spiritual cognizance; inasmuch as the right of judging of rates, and the enforcing of them, is of absolute necessity to render the statute effectual. *Gibs.* 195. (*x*)

Pursuant to this general doctrine, prohibitions have on many occasions been denied, or consultations granted, by the temporal courts. As in the case of *Paget* and *Crumpton* (*Cro. El.* 659.); where it was moved, that they of the spiritual court would try the quantity of the land (the tax being according to the rate of their land, and the person pretending that he was taxed for more land than he really had), and it was alleged, that this was always triable at the common law; the resolution of the court was, that the principal being suable in the spiritual court, the circumstances concerning it are inquirable and triable there also:

(10) *Rex* v. *Chapelwardens of Milnrow*, 5 *Maule & Selwyn's Reports*, 252, *acc.*

(*x*) 5 *Rep.* 66. *Jeffrey's* case. And lately the court of K. B. refused to grant a mandamus to churchwardens to make a church rate, it being a subject of ecclesiastical jurisdiction. *Rex* v. *The Churchwardens of St. Peter's Thetford*, 5 *T. Rep.* 364. [But it lies to the churchwarden, &c. of two united parishes, under stat. 10 *Ann. c.* 11., to assemble a meeting pursuant to § 24. for the purpose of agreeing on and ascertaining the monies and rates to be assessed for repair of the church of one of those parishes. *Rex* v. *St. Margaret, Westminster* (*Churchwardens and Overseers*), 4 *M. & S.* 250.]

and a consultation was awarded. So also where it was suggested in order to a prohibition, that the lands were over-rated; and that the custom of the parish was, not to be rated according to lands and houses, but according to sheep-walks: the court declared, as to the first suggestion, that it was not material; because rates being to be proportioned to the value of the land, the valuing of the land must properly belong to the spiritual court: and as to the second, it was said by *Haughton* (but not finally resolved by the court,) that of common right the house and all the lands are chargeable to the reparation of the church; and that customs, in prejudice of such reparations, are void; as, at another time, the discharge by custom of 900 acres of wood, from payment of church rates, was declared to be a custom against law. Again, in the case of *Longmore* and *Churchyard* (*Latch*, 217.), where the suggestion was, that by custom the rate ought to be in proportion to the king's tax, and that the party was rated above that proportion; *Bulstrode* said this was a spiritual matter, and ought to be tried in the spiritual court, unless it appeared that some proof, which ought to be allowed by the rules of the common law, had been offered there and disallowed: and in the event, consultation was awarded by the whole court. [387]
So (*Poph.* 197.) where it was alleged that the rate was imposed needlessly (*viz.* for casting new bells, where there were four before), a prohibition was denied. In like manner (1 *Ventr.* 308.), where a prohibition was prayed, upon a surmise that the tax was imposed upon one part of the parish, omitting the rest; the court doubted, in regard it was not alleged that they had offered that plea in the ecclesiastical court; because reparation of churches is proper for their cognizance. And though a prohibition was granted, that the others might demur, if they thought fit, yet it was afterwards countermanded: for this may be properly pleaded in the spiritual court: and if not allowed, is cause of appeal. *Gibs.* 195.

So if a suit is instituted in the ecclesiastical court for a church rate, and a custom pleaded of a certain sum, or of something done, in lieu of the rate, and that plea is admitted, they may proceed to try that custom in the same manner as a modus; but if the custom is denied, it will be a proper ground for a prohibition (by the lord chancellor *Hardwicke*) for defect of trial in the ecclesiastical court, for the trying of the custom is the province of the common law. 1 *Atkyns*, 289.

So, if the bounds of the parish come in dispute in the ecclesiastical court, that is, if the party assessed aver, that the land for which he is assessed lies in another parish, and not in the parish where it is assessed; if the party be contentious, he may have a prohibition, and try it at common law. *Degge*, *P.* 1. *c.* 12.

[By statutes 58 *G.* 3. *c.* 127. § 7. for England, and 54 *G.* 3.

c. 68. § 7. for Ireland, when any person rated to church or chapel rate (*the validity of which has not been questioned in any ecclesiastical court*) shall refuse to pay the same, any justice of the county, city, or town, where the church is situate, on complaint of the churchwardens who ought to receive the same, may convene, by warrant, such person before two or more justices, and examine, on oath administered by them, into the merits of the complaint, and, by order under their hands and seals, may order payment of *any sum so due not exceeding* 10*l.*, besides costs, ascertained by the justices; and on refusal or neglect to pay according to such order, any one of such justices, by warrant under hand and seal, may levy the money thereby ordered to be paid, with the above costs, as well as those of distress, being first allowed as above, by distress and sale of the goods of the offender, his executors or administrators, rendering him the overplus. Any person grieved by the judgment of two or more such justices, may appeal to the next quarter sessions for the county, &c., wherein the church, &c. for which the rate was made is situate; and if the justices present, or a majority, find cause to affirm the judgment, it shall be decreed by order of sessions, with costs, to be levied by distress and sale of appellant's goods. Provided, that when such appeal is made as above, no distress-warrant shall be granted till after its determination; and that *nothing herein shall alter the jurisdiction of ecclesiastical courts to hear and determine causes touching the validity of any church or chapel rate; or from enforcing payment thereof, if exceeding* 10*l.*, *from the party proceeded against: if the validity of such rate or liability of the person from whom it is demanded be disputed, and the party give notice thereof to the justices, they shall forbear giving judgment thereon, and the persons demanding the same may proceed to recovery of their demand by due course of law, as before accustomed:* but nothing herein shall affect parliamentary regulations respecting church or chapel rates of any particular parishes or districts. And by 54 *G.* 3. *c.* 170. § 12. the goods and chattels of any person neglecting to pay any sum legally assessed on him for any church-cess, for seven days after demand made, may be distrained, not only within the district, parish, township, or hamlet, in which it is made, but also within any other district, parish, &c. within the same county, riding, division, or jurisdiction; and if sufficient distress cannot be found within such county, &c. then, on oath thereof made before any one or more justice or justices of the peace of any other county, &c. in which any of the goods or chattels of such person shall be found, which oath such justice or justices shall administer and certify, by indorsing his or their name or names on the warrant granted to make such distress, such goods, &c. shall be liable to such distress and sale in such other county, &c. and may, under such warrant and certificate,

be distrained and sold, as if found within the district, parish, &c. in or for which the rate was due.

Before passing 53 G. 3. c. 127. § 7. considerable delay and expence was incurred in the recovery of church rates. That act provides a summary remedy, by application to justices of peace in cases of withholding church rates not exceeding 10*l.*, where the party does not dispute the obligation to pay them, but does not invest justices with the power which belongs exclusively to the ecclesiastical court, *viz.* the power of deciding on the validity of the rate, or the liability of the person to pay it. The justice cannot issue his warrant, unless it be made affirmatively to appear before him that the amount does not exceed 10*l.*, and that no question is made on the rate in the ecclesiastical court. If neither of these preliminary exceptions have place, the party may give notice to the two justices before whom he is summoned to appear, that he disputes the validity of the rate, or his liability to pay it, though no proceeding is actually commenced in the ecclesiastical court: and any expression by him, manifesting that he disputes the rate *boná fide*, will be a sufficient notice to make a *cesser* of the proceedings before the justices. *The King* v. *the Chapelwardens of Milnrow*, 5 *M. & S. Rep.* 248.

Where a constable, having a warrant of distress under 53 G. 3. c. 127. § 7., broke the outer door of, and entered plaintiff's dwelling-house, it was held, that although he thereby exceeded his authority; yet as it was not shewn that he acted with any other intention than that of executing the authority delegated to him by the warrant, no action could be maintained after the expiration of three calendar months after the fact committed. (See § 12. of the act.) *Theobald* v. *Crichmore*, 1 *Bar. & Ald. Rep.* 227.]

And by the 17 *Geo.* 2. *c.* 37. Where there shall be any dispute in what parish or place improved wastes, and drained and improved marsh lands lie, and ought to be rated; the occupiers of such lands, or houses built thereon, tithes arising therefrom, mines therein, and saleable underwoods, shall be rated to this and all other parish rates, within such parish and place as lies nearest to such lands: and if on application to the officers of such parish or place to have them rated as aforesaid, any dispute shall arise, the justices of the peace at the next sessions after such application made, and after notice given to the officers of the several parishes and places adjoining to such lands, and to all others interested therein, may hear and determine the same on the appeal of any person interested, and may cause the same to be equally assessed; whose determination therein shall be final. But this shall not determine the boundaries of any parish or place, other than for the purpose of rating such lands to the parochial rates as aforesaid. [388]

And the church rate charged upon *quakers* is recoverable

before the justices of the peace, in like manner as are their tithes. (1)

If the churchwardens defer to make or collect their rate until they are out of their office, they are deprived of all legal authority of doing either; but they may present the persons in arrear, at the Easter visitation when they go out of their office; and the judge will cause justice to be done therein, or their successors may prosecute for the same. 1 *Bac. Abr.* 376. (See tit. **Churchwardens**, 13 *et seq.*)

X. *Churches not to be profaned.*

Arrest in the church or church-yard.

1. *By the* 50 *Ed.* 3. *c.* 5. Because that complaint is made to our lord the king, by the clergy of his realm, that divers persons of holy church, *whilst they attend to divine service* in churches, church-yards, and other places dedicated to God, be sundry times taken and *arrested by authority royal*, and commandment of other temporal lords, in offence of God and of the *liberties of holy church*, and also in disturbance of divine services aforesaid: the same our lord the king willeth and granteth and defendeth *upon grievous forfeiture*, that none do the same from henceforth; so that collusion or feigned cause be not found in any of the said persons of holy church in this behalf.

And by the 1 *R.* 2. *c.* 15. Because that prelates do complain themselves, that as well beneficed people of holy church, as other, be arrested and drawn out as well of cathedral churches as of other churches and their churchyards, and sometimes whilst they be intended to divine services; and so arrested and drawn out, be bound and brought to prison, against the liberty of holy church: it is ordained, that if any minister of the king, or other, do arrest any person of holy church by such manner, and thereof be duly convict: he shall have imprisonment, and then be ransomed at the king's will, and make gree to the parties so arrested. Provided always, that the said people of holy church shall not hold them within the churches or sanctuaries, by fraud or collusion in any manner.

Whilst they attend to divine service] And that as well on the week days, as on Sundays and holidays. *Wats. c.* 34.

Arrested] And if any arrest be made contrary to these statutes,

(1) For statute 53 *G.* 3. *c.* 127., "after reciting in § 6. that by 7 & 8 W. 3. c. 34. § 4. and 1 *G.* 1. *st.* 2. *c.* 6. § 2. and 7 *G.* 3. *c.* 21. *Ir.* made perpetual by 12 *G.* 3. *c.* 10. § 9. *Ir.*, where a quaker refuses to pay *church rates*, two or more of H. M.'s justices shall hear and determine the same, if not exceeding 10*l.* value," extends their power to 50*l.* ;and one justice may receive the original complaint, and summon the parties to appear before two or more justices, as in 7 & 8 *W.* 3. *c.* 6. § 1. is set forth. 54 *G.* 3. *c.* 68. § 6. contains a like provision for Ireland. As to distraining for church rate, see 387. 387 *a.*

and the person arresting doth presently discharge the person arrested, upon pretence of ignorance, or the like; yet this will not excuse the contempt in making the arrest. *Wats. c.* 34. (*y*)

By authority royal] That is, in civil cases only, betwixt party and party; but not in cases criminal: and therefore a person may be apprehended going to or returning from divine service, by a warrant from a justice of the peace; it being for breach of the peace, and for the king: and so in like cases. *Wats. c.* 34. (*z*)

Liberties of holy church] This was the common law of the church before; of which these statutes are only an affirmance. 12 *Co.* 100.

Upon grievous forfeiture] And he that doth offend against the aforesaid statutes, may not only be fined in the temporal court; but may be excommunicated by the ecclesiastical judge for so doing, and condemned in costs. *Wats. c.* 34.

Nevertheless, after all, notwithstanding that the person arresting is liable to be punished for so doing, yet the arrest (if not on a Sunday) is good in law; so that if a rescous be made, and thereby any person shall be killed, the killing is murder. *Wats. c.* 34. (*a*)

2. By the 13 *Ed.* 1. *st. Wynton, c.* 6. The king commandeth, that from henceforth neither fairs nor markets be kept in churchyards, for the honour of the church. (2) **Fairs and markets.**

Othobon. None shall hold a market of any things to be sold, nor presume to exercise any traffic in churches. *Athon.* 137.

Nor in churchyards. *Ib.*

3. *Langton.* Causes of blood shall not be heard in the church or churchyard. *Lind.* 270. **Temporal courts.**

Can. 88. The churchwardens or questmen, and their assistants, shall suffer no temporal courts, leets, or lay juries, to be kept in the church, chapel, or churchyard.

4. *Can.* 88. The churchwardens or questmen, and their assistants, shall suffer no plays to be kept in the church, chapel, or churchyard. (*b*) **Plays.**

The acting of plays in churches seemeth to have been frequent in this and other nations, during the times of popery: as appears from the decretal epistle against them. At the Reformation, and for some time after, those plays and interludes were very common; and, being representations of the corruptions of the monks, and the popish clergy, were very acceptable to the people. In [390]

(*y*) *Cro. Car.* 602.
(*z*) *Cro. Jac.* 321.
(*a*) See Lord's day, 6. 2 *Keb.* 777. 2 *Buls.* 72.
(2) Bristol St. James's fair is held in the churchyard of the church of St. James, in that city. See as to origin of fairs, *ante*, 339.
(*b*) See Churchwardens, 8.

the time of archbishop Grindal, there were an idle sort of people, who set up bills daily, but especially on holy days, inviting to their plays; by whose impure mouths God's word was profaned and turned into scoffs; and the archbishop moved secretary Cecil for a proclamation to suppress them. And it appears by this canon, that this profane usage was not then quite driven out of the churches and churchyards. *Gibs.* 191.

Feasting. 5. *Can.* 88. The churchwardens or questmen, and their assistants, shall suffer no feasts, banquets, suppers, church ales, drinkings, or any other profane usage to be kept in the church, chapel, or churchyard.

These five prohibitions do all refer to the wake, or feast of the dedication of churches; the observation of which, among christians, was very ancient, and is particularly injoined by the canon law. And in the laws of Edward the confessor, *Of the times and days of the king's peace*, one time is, in the parishes of those churches where the proper festival of the saint is celebrated. But the observation of them, however piously intended, grew by degrees into great excesses of eating and drinking, and other irregularities; which, by the way, were at first in some sort indulged to the English by Gregory the great, at this feast of the dedication, in lieu of their sacrifices while they were heathens, *viz.* that they might set up booths round the church, and there feast and entertain themselves: But the entertainments being forbidden (as was before observed,) the solemnity itself, though revived by the book of sports, hath been since in great measure disused; and together with it, the disorders by this canon here prohibited. *Gibs.* 191.

Musters. 6. *Can.* 88. The churchwardens or questmen, and their assistants, shall suffer no muster to be kept in the church, chapel, or churchyard.

Brawling. (3) 7. If any person shall, by words only, quarrel, chide, or brawl

(3) The statute 5 & 6 *Ed.* 6. *c.* 4. did not create the offence of brawling, for it subsisted by common law before it was enacted; and a party may now proceed either on the statute or on the ancient law: for wherever a statute leaves an offence as it found it, and only introduces additional punishment, a party may proceed on either. *Wenmouth* v. *Collins, Ld. Raym.* 850. Thus proceedings under § 1. of the statute must be supported by two witnesses on the specific charge; while by the ecclesiastical law one to the fact and one to the circumstance would be sufficient. *Hutchins* v. *Denziloe,* 1 *Hagg. Rep.* 181. The court will consider time and place in cases of "*chiding, quarrelling,* and *brawling:*" that may be "*chiding*" or "*brawling*" in the church which would not be so in the vestry. The vestry is a place for parish business, and the court would not interfere further than might be necessary for the preservation of due order and decorum. 1 *Hagg. Rep.* 184, 185. Suspension of a parishioner *ab ingressu ecclesiæ*, prescribed by 5 & 6 *Ed.* 6. *c.* 4., was limited to a month only,

in any church or churchyard; it shall be lawful unto the ordinary of the place, where the same offence shall be done, and proved by *two* (4) lawful witnesses, *to suspend every person so offending;* if he be a layman, from the entrance of the church; and if he be a clerk, from the ministration of his office, for so long time as the said ordinary shall think meet according to the fault. 5 & 6 *Ed.* 6. *c.* 4. § 1.

To suspend every person so offending] *H.* 15 *Ja.* *Large* and *Alton.* A prohibition was prayed upon this statute, because that *costs* were given in the spiritual court; but it was denied by the court; the costs being there for the expences of the suit: otherwise, if it had been for damages. *Cro. Ja.* 462. [391]

8. If any person *shall smite or lay any violent hands* upon another, *in any church or churchyard;* then *ipso facto* every person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation. 5 & 6 *Ed.* 6. *c.* 4. § 2. Striking.

Shall smite or lay any violent hands] If one be assaulted in the church, or within a churchyard; he may not beat the other, or draw a weapon there, although the other assaulted him, and it be therefore in his own defence: for it is a sanctified place, and he may be punished for that by this statute. And it is the same in any of the king's courts, or within view of the courts of justice; because a force in that case is not justifiable, though in a man's own defence. *Cro. Ja.* 367. 1 *Haw.* 139.

M. 1 *An.*, *Wenmouth* and *Collins.* It was moved to have a prohibition granted to the ecclesiastical court, to stay a suit there against Wenmouth, for brawling in the belfrey, and striking a man there, upon suggestion of this statute, and alleging that all

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under certain circumstances (*Clinton* v. *Hatchard*, 1 *Add. Rep.* 96.); and in another case, *Canning* v. *Sawkins*, 2 *Phill. Rep.* 293., for brawling in a chancel, to three weeks, with notification in the church of such suspension in the latter case, and costs in both. In *Cox* v. *Goodday*, 2 *Hagg. Rep.* 138., a *clergyman* was suspended for a fortnight, for words spoken during divine service, by way of admonition, of a passionate tenor, though expressed without any *tone* of passion. Costs were *prayed*, but the report does not notice whether they were *granted*. This being a criminal proceeding, the office of the judge wrongly promoted, by *misnomer* of the judge in a copy of the articles for this offence, is fatal. *Williams* v. *Bott*, 1 *Hagg. Rep.* 1. And *semble*.—The articles should be in his name, as vicar-general *and* official principal; for the criminal jurisdiction of their offices seems in some degree concurrent. The omission, however, of the latter description is fatal. *Thorpe* v. *Mansell*, 1 *Hagg. Rep.* 4. As to evidence of brawling, see *Austen* v. *Dugger*, 3 *Phill. Rep.* 120.

(4) Proceedings under these words must be supported by *two* witnesses on the specific charge, or will be dismissed. *Hutchins* v. *Denziloe*, 1 *Hagg. Rep.* 181.

statutes are construable by the common law, and that Wenmouth came there as mayor to suppress a riot: But the court (Holt chief justice being absent) denied a prohibition, because this offence was cognizable in the ecclesiastical court before this statute, *ratione loci*; and the statute, though it provides a penalty, doth not alter the jurisdiction. *L. Raym.* 850.

Lay any violent hands] But it hath been holden, that churchwardens, or perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of this statute. 1 *Haw.* 139. (5)

In any church or churchyard] *E.* 33 *El.* In *Dethick's* case, who struck another in St. Paul's churchyard in London; the court were clearly of opinion, that cathedrals as well as other churches are within the meaning of this statute. *Cro. El.* 224. 1 *Leon.* 248.

[392] *Ipso facto*] But notwithstanding that the words of the statute be so expressed, that he who smites another shall *ipso facto* be deemed excommunicate, yet there ought to be a precedent conviction at law, which must be transmitted to the ordinary, or else the excommunication must be declared in the spiritual court upon a proper proof of the offence there; for it is implied in every penal law, that no one shall incur the penalty thereof, till he be found guilty upon a lawful trial: also it must be intended in the construction of this statute, that the excommunication ought to appear judicially, because otherwise there could be no absolution. 1 *Haw.* 139. (6)

In the case of *Wilson* and *Greaves*, *H.* 30 G. 2. A prohibition was moved for on this clause, and the suggestion was, that there ought to have been a previous conviction at law. But by the court, That is not necessary upon this clause. It is still indeed an offence at common law, and a man may be indicted for it; but besides this, he may be *ipso facto* excommunicated by the ordinary. If there is a conviction at law, the ordinary may use it as a proof of the fact; but he may proceed without any such previous conviction. And the proceedings of the two courts being *diverso intuitu*, it is no objection to say, that a man will at this rate be twice punished for the same offence. And this is common in many cases: for the temporal courts proceed to punish; the ecclesiastical to amend. *Burrow, Mansfield*, 240.

(5) *Cowtney* v. *Phiips*, 1 *Lev.* 196. 1 *Siderf.* 196. *Hawe* v. *Planner*, 1 *Saund. Rep.* 14.

(6) *Dub. Dyer*, 257. *b.* But *acc. in marg.* transmission of a conviction is sufficient without sentence upon it. *Dier* v. *East*, 1 *Ventris*, 146.

But there must be a sentence declaratory at least in the spiritual court: otherwise the excommunication could not have effect; for no *excommunicato capiendo* could issue, without a *significavit* from the spiritual judge; and no *significavit* could issue but upon some proceedings before the said judge; nor otherwise could the party ever be absolved. *Bilson* and *Chapman*, *H.* 9 *G.* 2. *Cas. Hardwicke*, 190. (7)

Drawing a weapon.

9. If any person shall *maliciously* strike any person with any weapon, in any church or churchyard; *or shall draw any weapon* in any church or churchyard, *to the intent to strike another* with the same weapon; he shall, on conviction by verdict of twelve men, or by his own confession, or by two lawful witnesses, at the assizes or sessions, be adjudged to have one of his ears cut off; and if he have no ears, he shall be burned in the cheek with a [393] hot iron, having the letter F, whereby he may be known and taken for a fray-maker and fighter; and besides, he shall be and stand *ipso facto* excommunicated as is aforesaid. 5 & 6 *Ed.* 6, *c.* 4. § 3.

Maliciously] It is not enough to say in the indictment, that he struck, but it must be also that he did it *maliciously*. *Noy*. 171.

Or shall draw any weapon] If a man take up a stone in the churchyard, and offers to throw it at another; or having a hatchet or ax in his hand, offers to strike another therewith; this is not an offence within these words: for these are not such weapons as may properly be said to be *drawn*, as a sword or dagger. *Wats. c.* 34.

To the intent to strike another] *E.* 33 *Eliz. Penhallo's* case. He was indicted upon this statute, for *drawing his dagger in the church of B. against J. S.*, and it was not said *to the intent to strike him;* and for this cause the indictment was adjudged void. *Cro. Eliz.* 231. (8)

In the year 1415, which was before this statute, the wives of *lord Strange* and *sir John Trussel*, contending for precedency of

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(7) A person may be excommunicated as above, without any prior conviction at law, unless on the third clause, of striking with or drawing a weapon; and there a temporal punishment (the loss of an ear) being inflicted, and the excommunication being an accumulated punishment, a prior conviction is requisite. *Ibid.* and *supra, ipso facto.* And a plea of excommunication in the plaintiff *ipso facto*, because he had smitten, &c. without shewing an excommunication by the ordinary, or under his seal, was ruled to be ill. *Cro. Eliz.* 919. *Sonham* v. *Trundle*.

(8) The star chamber resolved, in *Frances* v. *Ley*, *Cro. Jac.* 367, "That when any is assaulted or beaten in church or churchyard, it is not lawful for him to return blows in his own defence, as he may elsewhere."

place in the church of St. Dunstan in the east in London, their husbands thereupon, with all their retinue, engaged in the quarrel, and within the body of the church some were killed and many wounded. For which profane riot, several of the delinquents were committed, and the church suspended from the celebration of any divine office. By process in the court christian, the lord Strange and his lady were adjudged to be the criminal parties, and had this solemn penance imposed upon them by that exemplary prelate archbishop Chicheley: the lord Strange walked bare-headed with a wax taper lighted in his hand, and his lady bare-footed, from the church of St. Paul to that of St. Dunstan; which being rehallowed, the lady with her own hands filled all the church vessels with water, and offered to the altar an ornament of the value of 10*l.*, and the lord a piece of silver to the value of 5*l.* *Ken. Par. Ant.* 560.

By statute 27 *G.* 3. *c.* 44. No suit shall be brought in any ecclesiastical court, for striking or brawling in any church or churchyard, after the expiration of eight calendar months from the time when such offence shall have been committed.

Robbing of churches.

10. If a man do break and enter a church in the night, of intent to steal, this is burglary; for the church is the mansion house of Almighty God. 3 *Inst.* 64.

[394] And here, note a diversity between a spiritual man of the church consecrated to the service of God, and goods dedicated to divine service, or merely ecclesiastical: for laying of violent hands upon a person in holy orders, the ecclesiastical court hath conusance; but for the violent taking away, or consuming of the ornaments of the church, or goods dedicated to divine service, that court (lord *Coke* says) hath no conusance, for that it is not given to them; as for taking away of the bible, the book of common prayer, the chalice, and the like: or for the taking away of an image out of the church; but remedy must be taken for these at the common law. 2 *Inst.* 492.

But Dr. *Watson* says, a libel may be also in the spiritual court against the offender, *pro salute animæ et reformatione morum*; although not to recover damages. *Wats. c.* 39.

But this must be understood where the offence doth not amount to felony; for in that case the spiritual court hath no jurisdiction. *Exam. of the scheme of ch. power*, 90.

In the lent assizes holden at Leicester, 11 & 12 *J.* the case was, One *William Haines* had digged up the several graves of three men and one woman in the night, and had taken their winding sheets from their bodies, and buried them again; and it was resolved by the justices at Serjeants Inn in Fleet-street, that the property of the sheets remained the owners, that is, in him who had property therein when the dead body was wrapped up there-

with, for the dead body is not capable of it; and that the taking thereof was felony. 12 *Co.* 113. (*c*)

11. Anciently the church and churchyard was a sanctuary, and the foundation of abjuration; for whoever was not capable of this sanctuary, could not have the benefit of abjuration; and therefore he that committed sacrilege, because he could not have the privilege of sanctuary, could not abjure. This abjuration was, when a person had committed felony, and for safeguard of his life had fled to the sanctuary of a church or churchyard, and there before the coroner of that place, within forty days, had confessed the felony, and took an oath for his perpetual banishment out of the realm into a foreign country, chusing rather to lose his country than his life: but the foreign country into which he was to be exiled might not be amongst infidels. 3 *Inst.* 115. (9) Sanctuary.

But by the act of the 21 *Ja. c.* 28. § 7. it is enacted, That *no sanctuary, or privilege of sanctuary, shall be admitted or allowed in any case.* By which act, such abjuration as was at the common law, founded (as hath been said) upon the privilege of sanctuary, is wholly taken away: but the abjuration, by force of the statutes of the 35 *El. c.* 1. and 35 *El. c.* 2., in the case of recusants, remaineth still; because such abjuration hath no dependency upon any sanctuary. 3 *Inst.* 115, 116. [395]

And the law was so favourable for the preservation of sanctuary, that if the felon had been in prison for the felony, and before attainder or conviction had escaped and taken sanctuary in the church or churchyard, and the gaolers or others had pursued him, and brought him back again to prison; upon his arraignment he might have pleaded the same, and should have been restored again to the sanctuary. 3 *Inst.* 217.

XI. *Churchway.*

The right to a church-way may be claimed and maintained by libel in the spiritual court. This is supposed in the several reports upon this head, by the mention of particular circumstances, without which prohibitions would not have laid. *Ayl. Par.* 438. *Gibs.* 293.

A church-way may commonly be claimed as a private way: and upon suggestion that it is a highway, a prohibition will be granted; so if the suggestion prove true, the right is triable at common law. *Gibs.* 293. 2 *Roll's Abr.* 287. *Ayl. Par.* 438. (*d*)

(*c*) See Burial, 11.

(9) This privilege lasted for *forty* days, during which time any person might furnish him meat and drink for his sustentation, but not after, on pain of being guilty of felony. *Horne's Mirror of Justice, lib.* 1.

(*d*) A way to a parish church, or to the common fields of a town, or

Prescription for a churchway may be pleaded by any inhabitant in the spiritual court. This was done in the 16 *Ja.*, but upon suggestion that it had been enjoyed by permission only, and not as of right, a prohibition was granted: as it was also in a case which Rolle mentions in the same year; when the churchwardens of *Bithorne* and *Boue* sued for a churchway as appertaining to all the parishioners by prescription. *Gibs.* 293.

Which case mentioned by *Rolle* is thus: If the churchwardens of a church sue for a way to a church, that they claim to belong to all the parishioners by prescription, a prohibition shall be granted; for this is temporal. 2 *Roll's Abr.* 287.

[XII. *Building Churches.*

By 43 *G.* 3. *c.* 108., entitled, "*An act to promote the building, repairing, or otherwise providing of churches and chapels, and houses for residence of ministers, and churchyards, in England and Ireland,*" (amended by 51 *G.* 3. *c.* 115., 52 *G.* 3. *c.* 161. § 27.: and see 53 *G.* 3. *c.* 45. § 33. *passim,*) it is enacted, That every person having in his own right any estate or interest in possession, reversion, or contingency, of or in lands or tenements, or of property in any goods or chattels, may, by deed enrolled in such manner and time in England as by 27 *H.* 8. *c.* 16., and in Ireland as by 10 *C.* 2. *c.* 1., or by will in writing duly executed according to law, such deed or will being duly executed three months before death of grantor or testator, give and vest in any person, or body politic or corporate, their heirs and successors respectively, any lands not exceeding five acres, or goods and chattels not

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to a village, which terminates there, may be called a private way, because it belongs not to all the king's subjects, but to the particular inhabitants of such parish, house, or village, each of which, as it seems, may have an action for nuisance therein: whereas nuisances in highways are punishable by indictment, and are not actionable unless they cause a special damage to some particular person. 3 *Bac. Ab.* [tit. *Highways,* (A.)] Yet an indictment for stopping *communem viam pedestrem ad ecclesiam de Whitby* was held good; for it was taken to be a footway common to all, and not merely to the parishioners, and that the church was only the *terminus ad quem.* [*The King* v. *Thrower*], 1 *Ventr.* 208. cited in [*The King* v. *Sainthill*], 2 *Raym.* 1175. If a way leading to a church be a private way, he who ought to repair may be compelled to repair by the ecclesiastical court, and no prohibition will lie; but otherwise, if it be a highway, though it lead to a church. *March.* 45. If it be a highway, that is, common to all his majesty's subjects, the charge of repairing it, of common right, lies on the occupiers of lands within the parish, but may be cast on certain persons, by reason of inclosure, tenure, or prescription, and in some cases is to be regulated by the surveyors appointed by stat. 13 *G.* 3. *c.* 78. See 3 *Bac. Ab.* 193, 191.

exceeding 500*l.*, towards erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the united church of England and Ireland are observed, or any house for residence of the officiating minister, or any outbuildings, offices, churchyard, or glebe for the same respectively, and to be for those purposes applied according to the terms of the deed or will, the consent of the ordinary being first obtained, and if no such limitation is made in the deed, the gift shall be applied as shall be appointed by the patron and ordinary, with consent of the incumbent: and such grantees, their heirs, &c. may take, as well from persons charitably disposed to give the same, as from all others willing to sell them, any lands, tenements, or chattels, without licence, or writ of *ad quod damnum*, notwithstanding the statute of mortmain; but these powers shall not extend to persons within age, insane, or femes coverts, 43 *G.* 3. *c.* 108. § 1.

His majesty, by deed [under the great seal; but see now 52 *G.* 3. *c.* 161. § 27.] under the seal of his duchy of Lancaster, may give all such his estate or interest in any lands or tenements within survey of exchequer, or of that duchy, for the like purposes with the like consent (as in 13 *G.* 3. *c.* 188. § 1.); but no one such grant shall extend to more than five acres: and such grants may be held notwithstanding the statutes of mortmain, 9 *H.* 3. *c.* 36., and 1 *A. st.* 1. *c.* 7., 51 *G.* 3. *c.* 115. § 1.

Only one such gift or demise shall be made by one person; and where either exceeds five acres, or 500*l.* value in goods and chattels, the lord chancellor, on petition, may order its reduction to that amount, and make further reasonable order in the premises, 43 *G.* 3. *c.* 108. § 2.

No glebe of more than fifty acres shall be augmented by more than one acre, and any excess therein shall be reduced by the chancellor, (as in § 2.) *id.* § 3.

Every body politic or corporate, sole or aggregate, by deed enrolled, (as in § 1.) with or without confirmation as the law may require, may give and grant for the purposes in § 1., either by way of exchange or benefaction, any small plot of land not exceeding one acre now held in mortmain, lying convenient for the use of some church, chapel, or minister's house of residence, churchyard, or curtilage thereof, or convenient to be employed as the site of some such church, chapel, or house to be hereafter erected, and for the necessary enjoyment thereof to any person or body, &c. soever, who with their heirs, &c. shall take full capacity, with consent of incumbent, patron, and ordinary, to take and hold such small plot of land for such purposes without licence, or writ of *ad quod damnum*, notwithstanding the statute of mortmain, *id.* § 4.

In every parochial church or chapel hereafter erected, ample provision shall be made for decent and suitable accommodation

of all persons soever entitled to resort thither, whose circumstances may render them unable to pay for the same, 43 *G.* 3. *c.* 108. § 5.

Any rights of giving or devising, already existing in any person, are not affected by this act, *id.* § 6.

His majesty may grant and vest in any person, or body politic or corporate, their heirs and successors, his interest in any lands or tenements not exceeding five acres, within survey of exchequer or of duchy of Lancaster, for curtilages, accesses, or other accommodations of any such churches or chapels, in the manner without the deeds passing the great seal; viz. the treasury may grant a warrant to any such person or body, &c. which shall be enrolled in the office of auditor of land revenue for the county within which such premises are situate, and also in that of the commissioners of woods, forests, and land revenues, or in that of the surveyor general of land revenues: which auditor and commissioners, or surveyor general, having enrolled the same, shall certify such enrolment at the foot or back thereof under their hands, and return it the grantees, who after such enrolment shall be deemed in actual possession, and shall hold the premises specified in the warrant free of all incumbrances, 52 *G.* 3. *c.* 161. § 27.

Every person having the fee simple of a manor, by deed under his hand and seal enrolled in chancery (as in § 1.), with or without confirmation as the law requires, may grant to the rector, vicar, or other minister of any parish church or chapel consecrated for the service of the church of England and Ireland, not exceeding five acres parcel of the waste of the manor, and lying within the parish where such church or chapel shall be erected, or within any extra parochial district in which such church, &c. shall be erected, for erecting thereon or enlarging any such church or chapel, or for a churchyard or burying ground, or enlarging the same, or for glebe on which to erect a residence for the minister, freed from all rights of common, &c. 51 *G.* 3. *c.* 115. § 2.

By *Stat.* 56 *G.* 3. *c.* 141., intituled "*An act for enabling ecclesiastical corporate bodies under certain circumstances to alienate lands for enlarging cemeteries or churchyards.*" Any spiritual or ecclesiastical body corporate, or spiritual person, being a corporation sole, possessing any land adjacent to any cemetery, churchyard, or burying-ground, may sell by indenture of bargain and sale (enrolled in chancery within six calendar months) for the purpose of consecration, any portion thereof, not exceeding one acre, for enlarging such churchyard, &c. *id.* § 1.

In case of any spiritual person being a corporation sole, the consent of the bishop or ordinary, and of the patron of the living, shall be testified by their being parties to the alienation of the land; previous to which the value thereof shall be ascertained, and with a description thereof committed to writing by some

competent person appointed by the ordinary, who shall verify the same on oath before a justice of the county, town, or district where the land is situated, if the value is above 100*l.* Other lands of equal value, estimated and verified as above, shall be conveyed to the same uses as those conveyed by the spiritual person, and as the consideration thereof; and if the value does not amount to 100*l.*, but is above 20*l.*, such value shall be paid to the governors of queen Anne's bounty, to be applied to the benefit of such spiritual person; and if it shall not amount to 20*l.* it shall be paid to such spiritual person, to be used at his discretion, 56 *G.* 3. *c.* 141. § 2.

No alienation by virtue of this act shall be questioned after twenty years expired, for want of compliance with the forms hereby prescribed, *id.* § 3.

All ground consecrated as burial-ground shall, after twenty years, be discharged of all adverse titles and claims thereto, and shall absolutely vest in the trustees thereof; or if there be no such trustees, then in the vicar or perpetual curate; or if no such vicar, &c. then in the rector of the parish, *id.* § 4.

His majesty may, by letters patent, appoint commissioners for carrying into execution this act, and may direct any five or more of them to act therein; the commission to continue in force for ten years from the date, unless sooner altered or revoked, *id.* § 8.

XIII. *Building and promoting the building of additional churches in populous parishes under 58 G. 3. c. 45. 59 G. 3. c. 134. 3 G. 4. c. 72.*]

[The following abstract of the complicated provisions of these acts is principally taken from Mr. Bramwell's excellent "Digest of those Acts;" to which in particular, and to the title CHURCHES in the Digest of the Statutes, and in the Analytical Index thereto, by Messrs. Tyrwhitt and Tyndale, the reader is recommended for more extended reference.]

ACTIONS,

Limitation of; defendants may plead the general issue, and shall have treble costs. 58 *G.* 3. *c.* 45. § 83.

ANNUITIES.

It shall be lawful for the churchwardens of any place in which money is authorized to be raised for the purposes of the acts, to raise the same, or any part thereof, by the grant of annuities, but not exceeding the rates specified in the tables annexed to the 36 *G.* 3. *c.* 52. 3 *G.* 4. *c.* 72. § 6.

APPORTIONMENT.

Whenever any rent for years, for life or lives, or in fee, shall be payable out of lands, part of which may be taken under the acts for the purposes thereof: —

It shall be lawful for public or corporate bodies, or trustees, or other persons giving or selling any portion of such lands, or from whom the same may be taken under the acts, to apportion such rents with the consent of the commissioners; and the lands used for the purposes of the acts, shall be wholly exonerated from such rents, but the remaining part of the lands shall be subject to the entire rent. 3. G. 4. c. 72. § 9.

It shall be lawful for the commissioners, if they think it expedient, to apportion among the separate divisions of any parish or place, made district parishes or chapelries for ecclesiastical purposes, any charitable gifts to such parish or place, or the produce thereof; and to direct the proportions to be distributed by the spiritual person serving the church or chapel, or the churchwardens or select vestry of any such separate divisions, either jointly or severally, as the commissioners may think expedient; and also to apportion among such separate divisions, any debts previously charged on the church rates in such parish or place; and all such apportionments shall be registered in the registry of the diocese, and duplicates thereof deposited with the churchwardens of each district. *id.* § 11.

BUILDING.

Powers to commissioners to build or cause to be built churches or chapels, under the act, upon such plans as they deem most expedient for affording accommodation for the most persons at the least expence; and such part thereof as commissioners, with consent of the bishop, under his hand and seal, shall direct, arranged in pews, shall be disposed of and let under the act; and the part not so arranged, shall be assigned for free seats, to be used by the parishioners or inhabitants, without any payment. 58 G. 3. c. 45. § 62.

Commissioners of his majesty's land revenues, with consent of three of the commissioners of his majesty's treasury, in writing, or his majesty by grant signed by the chancellor of the duchy of Lancaster, or the Duke of Cornwall by grant signed by the chancellor of that duchy, or any corporation, are empowered to give and grant any stone, slate, timber, or other materials, from any of their quarries, forests or wastes, for building churches or chapels under the said act or this act, and any house and garden for the residence of the spiritual person serving therein. 59 G. 3. c. 134. § 20.

Commissioners of the customs and excise of England, Ireland, and Scotland, with the consent, and under the authority in writing of three of the commissioners of the treasury, are authorised to remit or repay all or any proportion of the duties of custom or excise, for any stone, slate, bricks, timber, or other materials, procured for and used in building churches or chapels under said act or this act; and such duties shall be remitted, drawn back,

or repaid, as directed by three of the commissioners of the treasury. 59 G. 3. c. 134. § 21.

BUILDING MATERIALS.

It shall be lawful for the commissioners of customs and excise of England, Ireland, and Scotland, under the authority in writing of the commissioners of his majesty's treasury, to remit all or any proportion of the duties of customs or excise, or to order the same to be drawn back or repaid, upon stone, slate, bricks, timber, and all other materials which have been or shall be *bonâ fide* procured for or used in rebuilding, enlarging, or increasing the accommodation of any churches or chapels under the acts, or which shall have been built, enlarged, or increased, with the approbation of the commissioners, which approbation may at any time be certified under their seal. 3 G. 4. c. 72. § 27.

BURIALS.

None to be permitted in any church or chapel to be erected under the act, or in the adjacent cemetery, at a less distance than twenty feet from the external walls, except in vaults wholly arched with brick or stone, under any church or chapel, and to which the only access shall be by steps on the outside of the external walls, under the penalty of 50*l*. 58 G. 3. c. 91. § 10. See Churches. Churchyard. Division.

CHURCHES.

Built or acquired under the act, and appropriated to distinct parishes, to be perpetual curacies, and considered as benefices presentative, so far only that the licence thereto shall operate in the same manner as institution to any such benefice, and the spiritual person serving the same shall be deemed the incumbent thereof; and such incumbents shall have perpetual succession, and shall be bodies politic and corporate, and may take endowments in lands or tithes, or any augmentations granted to them; and all such incumbents, and persons presenting them, shall be subject to all jurisdictions and laws, and to lapse, on neglecting to nominate an incumbent for six months, as in cases of actual benefices. 58 G. 3. c. 45. § 25.

Churches or chapels of any parish or district parish not tenable with the original or any other church or chapel. § 26.

Laws relating to banns of marriage, marriages, christenings, churchings, and burials, and the registering thereof, and to all ecclesiastical fees, oblations, or offerings, shall apply to distinct parishes and district parishes, when complete, after avoidance of the existing incumbents, and to the churches and chapels thereof, and to the ecclesiastical persons serving them, in like manner as if they had been ancient separate parishes and parish churches. § 27.

Till such avoidance, no banns of matrimony, marriages, baptisms, churchings, or burials allowed in any separate parish or district parish, except by the incumbent of the original church, or his curate duly licensed. After avoidance, to be certified, and notification thereof entered as directed by this act (see NOTICE, 29.), all such rites may be performed in the church or chapel of any separated parish or district parish. 58 *G.* 3. *c.* 45. § 28.

All churches built or acquired under said act or this act, whether belonging to parishes completely divided, or to district parishes, shall, after consecration, become distinct benefices and churches for all ecclesiastical purposes. Provided, that during the existing incumbency (except as after excepted, see PATRONAGE, 13.) such churches shall be served by stipendiary curates appointed by the existing incumbent, and subject to all the laws relating to stipendiary curates, except as to assigning salaries to them by the bishop; and such existing incumbent shall, until avoidance, continue to hold all the churches of the divisions of his parish, as if they were one church, unless he shall voluntarily resign one or more of them; any statute against plurality of benefices, or other law to the contrary notwithstanding. 59 *G.* 3. *c.* 134. § 12.

No chapel built or acquired under said act, in any district parish for ecclesiastical purposes, and not the church of such district, shall be a perpetual curacy or benefice presentative under said act. § 19.

CHURCHWARDENS.

Two fit persons shall be appointed to act as churchwardens for every church or chapel built or appropriated under the act, at the usual period of appointing parish officers in every year; one by the incumbent, and the other by the inhabitant householders in the district; and when elected, they shall appear, and be admitted and sworn according to law; and shall receive the rents of the seats and pews, and pay the stipends or salaries to the minister and clerk, and shall do all acts requisite for the repairs, management, good order, and decency of behaviour in the church or chapel; and they shall continue in office till others be chosen: and on nonpayment of the rents of seats and pews, may enter upon and sell the same, or recover them by action, in the names of "The Churchwardens of the Church or Chapel of" [describing the same], without specifying their names; and no such action shall abate by their death or going out of office. 58 *G.* 3. *c.* 45. § 73.

Churchwardens of every parish in which any additional chapel shall be built or provided under the act, without making any division thereof into separate parishes or district parishes, shall do all such things as churchwardens to be appointed under the act are authorized and required to do. § 74.

CHURCHYARD. See BURIALS.

All parishes or extra-parochial places, required by the commissioners, shall furnish lands for enlarging, existing, or making additional churchyards or burial grounds, as the commissioners shall deem necessary; and the commissioners shall give notice to the churchwardens, to be left at their abodes, of the intention to enlarge the existing or set out new burial grounds, and of the extent of ground required for such purpose, and for a proper approach thereto, and of the place in which the same is required to be provided; and the churchwardens shall within fourteen days call a meeting of the vestry, or persons possessing the powers of vestry, for taking all necessary measures for providing the same: And in case the parish or place cannot provide the same without purchase, the vestry, or persons possessing the powers of vestry, are required forthwith to proceed to treat for ground according to such notice, but shall not conclude any bargain without the commissioners' approbation. 59 *G.* 3. *c.* 134. § 36.

All the powers and provisions of the said act or this act, which relate to the grant, sale, conveyance, purchase, and resale of lands or hereditaments from his majesty, or any corporations, persons under legal disabilities, or any other persons whomsoever, to or by the commissioners for building additional churches or chapels, or issuing, advancing, levying, raising, borrowing, or taking up at interest, money for any such purpose, shall extend to grants, &c. of lands or hereditaments necessary for enlarging or making any churchyard or burial ground, and approaches thereto, under this act, and for issuing, &c. money required for those purposes, repaying it by instalments or otherwise, as if all such provisions had been re-enacted in this act. § 37.

Lands added to any existing churchyard or burial ground, or appropriated for a new burial ground, shall, as soon as convenient, be consecrated for the burial of the dead, and shall for ever after be used as an additional burial ground; and the freehold of the land so consecrated shall thereupon vest in the person or persons in whom the freehold of the ancient burial ground of such parish or chapelry shall from time to time be vested. § 38.

The commissioners may, if they think fit, alter, repair, pull down, and rebuild, or order or direct to be altered, &c. the walls or fences of any existing churchyard or burial ground of any parish or chapelry; and to fence off any additional or new burial ground to be provided by this act; and also to stop up and discontinue, or alter, or order to be stopped up, &c. any entrance to any churchyard or burial ground, and the footways and passages over the same, as to them may appear unnecessary, or as they shall think fit to alter; provided the same be done with the consent of two justices of the peace, and on notice being given as prescribed by 55 *G.* 3. *c.* 68. 59 *G.* 3. *c.* 134. § 39.

It shall be lawful for the commissioners to authorise any parish, chapelry, township, or extra-parochial place, desirous of procuring or adding to any burial ground, to purchase any land the commissioners may think sufficient and properly situate for that purpose, and to make and raise rates for the purchase thereof, or repaying with interest any money borrowed for making such purchase; and the churchwardens or persons authorized to make rates shall exercise all the powers of said acts for making such purchases, and making and raising such rates; and when any land so purchased shall be situate out of the parish or place for which it is intended, the same shall, after consecration, be deemed part thereof. 3 *G.* 4. *c.* 72. § 26.

The clerk in every church or chapel erected, acquired, or appropriated under said act or this act, shall be annually appointed by the minister thereof. 59 *G.* 3. *c.* 134. § 29.

COMMISSIONERS.

His majesty, by letters patent, under the great seal, may appoint commissioners for executing the act, and direct that any five or more of them may act. 58 *G.* 3. *c.* 45. § 8.

The commission shall continue in force for ten years from the date, unless sooner revoked.

They are to examine the state of the parishes and extra-parochial places in the metropolis and its vicinity, and other parts of England and Wales, to ascertain in which additional churches and chapels are most required, and the most effectual means of affording such accommodation. § 9.

To appoint a secretary and clerk, and to employ surveyors and other persons to make plans, estimates, surveys, and reports, and to pay them salaries or rewards. § 10.

Empowered to re-sell lands not wanted. § 51.

His majesty may from time to time supply vacancies in the commission, occasioned by death, resignation, or otherwise, by appointing others, and may also appoint additional commissioners; and the commissioners appointed under said act and this act shall be a body corporate, by the name of "His Majesty's Commissioners for building new Churches," while any commission appointing such commissioners shall continue in force, and shall have a common seal. 59 *G.* 3. *c.* 134. § 3.

COMPENSATION.

Commissioners to ascertain the average amount of all fees, oblations, and offerings, whether voluntary or otherwise, for three years preceding any division into district parishes, and for each year subsequent to such division, during the existing incumbency, with power to examine on oath, &c. and to make compensation out of the monies granted by the act to the incumbent, during his incumbency, for any diminutio

thereof in consequence of the division. Questions of right not to be affected thereby. 58 *G*. 3. *c*. 45. § 32.

Corporations, or persons entitled to take fines on renewals of leases of lands sold for the purposes of the acts, shall receive, out of the purchase money, compensation equivalent to the interest which would arise to them out of the renewal, if renewed at the time of such sale. 3 *G*. 4. *c*. 72. § 4.

DIVISION,

Into separate parishes. If commissioners shall think it expedient to divide any parish into two or more SEPARATE PARISHES, *for all ecclesiastical purposes*, they may, with consent of the bishop of the diocese, under his hand and seal, apply to the patron of the church of the parish for his consent, and upon his signifying it under his hand and seal, the commissioners shall represent the whole matter to the king in council, stating the proposed bounds of such division, with the relative proportions of glebe lands, tithes, moduses, and other endowments, and the estimated amount of fees, oblations, offerings, or other ecclesiastical dues or profits within each division: and if his majesty in council shall direct such division to be made, such order shall be valid for effecting such division: Provided, that it shall not completely take effect till after the death, resignation, or avoidance of the existing incumbent. 58 *G*. 3. *c*. 45. § 16.

Incumbents of the churches of each division of the parish empowered to recover the tithes, &c. assigned to them, in like manner as the incumbent of the original parish. § 17.

New churches of such divided parishes shall, during the existing incumbency, remain chapels of ease, and be served by a curate nominated by the incumbent, and licensed by the bishop, and paid as after directed. § 18.

Every separate parish, when division complete, shall be a rectory, vicarage, donative or perpetual curacy, as the original church, and subject to the same jurisdiction and laws. § 19.

Donatives and perpetual curacies shall lapse in six months, like benefices; but no spiritual person appointed thereto shall be removable at the pleasure of the person appointing. § 20.

Into ecclesiastical districts and consolidated chapelries. After reciting that a considerable population is frequently collected at the extremities of, and locally situate in parishes or extra-parochial places contiguous to each other, at a distance from the churches or chapels of such parishes or places, enacts, that it shall be lawful for the commissioners, with such consent as required by said act, (§ 16.), to unite and consolidate any such contiguous parts of such parishes and places into a SEPARATE and distinct DISTRICT *for all ecclesiastical purposes*, and to cause

such district to be named and ascertained by described bounds; and such name and bounds, when approved by his majesty in council, to be enrolled in chancery, and in the registry of the diocese, and to make grants or loans for building, or to build any chapel, with or without cemeteries, in and for the use of the inhabitants of such district, in such manner, and under such regulations, as may to the commissioners appear most expedient, and to constitute any such district a *consolidated chapelry;* and every such chapelry shall be under the superintendence of such spiritual person as shall be appointed under this act to serve any such chapel, and such spiritual person shall have cure of souls in such district; and the right of presentation and appointment of such spiritual person shall thenceforth belong to such persons, and be exercised in such manner as may be agreed by the patrons of the churches or chapels of such parishes and extra-parochial places, with the approbation of the commissioners; and banns of marriage may be published, and marriages, christenings, churchings, and burials, may be solemnized in any such chapel after the consecration thereof; and the pew rents shall be fixed, and salaries to the minister and clerk assigned therefrom, as directed by said act or this act, concerning pew rents and salaries in separate parishes; and all fees and offerings within such chapelry, according to such table of fees as the commissioners shall make, with the approbation of the bishop, may be recovered in like manner as if such chapelry was a distinct parish; and the commissioners shall make compensation in manner directed by said act (see COMPENSATION) for any loss sustained by the incumbent of any contiguous parish or place, which shall form part of any such district, by reason of any fees, oblations, and offerings being transferred to the spiritual person serving any such chapel; and all such chapelries shall be deemed benefices, and be subject to the jurisdiction of the bishop and archdeacon where the altar of the chapel shall be locally situate, and to all laws in force concerning presentation and appointment to benefices and churches, and lapse, and all other laws relative to holding benefices and churches. 59 *G.* 3. *c.* 134. § 6.

In every case where commissioners shall think it expedient to divide any parish or extra-parochial place into separate parishes for ecclesiastical purposes, the commissioners may, with such consents as required by said act (DIVISION), apportion the proportions of glebe land, tithes, moduses, or other endowments or emoluments which it may be expedient to assign to each division, without regard to whether the proportions are locally situate, or arise within the division to which they may be assigned, or elsewhere. § 8.

It shall be lawful for the commissioners, with consent of the bishop, in dividing any parish, and apportioning the glebe or other endowments, to apportion also the permanent charges in respect thereof, or affecting them, or the incumbent; and the charges so apportioned shall thereafter be borne by each division, or the spiritual person serving it. 59 *G.* 3. *c.* 134. § 9.

When any parish shall be divided, all fees and emoluments of the clerk and sexton, afterward arising in any division, shall belong to the clerk and sexton of the division to which they shall be assigned, and shall be recoverable in like manner as they might have been recovered by the clerk and sexton of the original parish: and the commissioners may make compensation, as provided in other cases, for any loss of fees or emoluments any clerk or sexton may sustain by such division. § 10.

Into ecclesiastical districts: not consolidated chapelries. If commissioners shall think it not expedient to make such divisions into *separate parishes* as aforesaid, but that it is expedient to divide any populous parish or extra-parochial place into such ECCLESIASTICAL DISTRICTS, as they, with the consent of the bishop, under his hand and seal, may deem necessary to afford accommodation for attending divine service in the churches and chapels already built or to be built therein, as may appear to the commissioners convenient for the due performance of all ecclesiastical duties, and for the due ecclesiastical superintendence of such district, and the preservation and improvement of the religious and moral habits of the persons residing therein, the commissioners shall represent such opinion to his majesty in council, and shall state the bounds by which such districts are proposed to be described; and if his majesty in council shall think fit to direct such division to be made, such order shall be good for effecting such division, 58 *G.* 3. *c.* 45. § 21.

Or additional chapels. Or in any case in which the commissioners shall be of opinion, that it is not expedient to make any such division into ecclesiastical districts, they may build or aid the building of any additional chapels in any such parishes or places, to be served by curates to be appointed by the incumbents of the churches of the parishes or places, and licensed by the bishop, with salaries, as after directed. *Ibid.*

Boundaries of new parishes created by any complete division, and of ecclesiastical districts, shall be ascertained, and the description of such bounds enrolled in chancery, and registered in the registry of the diocese, and notice thereof given, as the commissioners shall direct. § 22.

Upon representation of the commissioners, made with consent of the bishop, signified under his hand and seal, such boundaries

may be altered by the king in council, within five years after enrolment; which alterations shall be enrolled and registered as aforesaid. 58 G. 3. c. 45. § 23.

Such boundaries shall continue the boundaries of such parishes or districts, and such districts shall become district parishes, and be called by such names as given to them in the instrument enrolled, and shall be separate district parishes; and the churches and chapels assigned to them, when consecrated, shall be district parish churches, for all purposes of ecclesiastical worship and performance of ecclesiastical duties; and as to all marriages, christenings, churchings, and burials, and the registry thereof, and in relation to all fees, oblations and offerings, and as to all other purposes, except as in the act excepted. (Sect. 30, 31.) § 24.

Divisions into *district parishes* only, not to affect any land, glebe, tithes, moduses, or endowment of the original church. § 30.

Into separate parishes or district parishes, not to affect any parish or place, or the persons residing therein, otherwise than in the act provided, or any poor or other parochial rate, or the persons interested therein, except church rates, as regulated by the act. § 31. See CHURCHWARDENS. PATRONAGE. VESTRY.

Assigning particular district to chapel already existing, or built, &c. under these acts. Commissioners may in same manner, and with such consents as required in case of division into ecclesiastical districts, assign a particular district to any chapel of ease or parochial chapel already existing, or which may be built or acquired under said act or this act; and such districts shall be under the immediate care of the curate appointed to serve such chapel, but subject to the superintendence and control of the incumbent of the parish church; and all such curates shall be nominated by the incumbent of the parish to the bishop for his licence, except where the nomination shall be vested in another person, and in such case by that person; subject to all the laws in force relative to stipendiary curates, except assigning to them salaries; provided that the commissioners may, with consent of the bishop, determine whether any and what part of the fees or dues for marriages, baptisms, churchings and burials, shall be assigned to such curate; and whether banns of marriage shall be published, and marriages or baptisms, churchings or burials shall be solemnized in any such chapel or not; and in any case in which marriages shall be allowed in any such chapel, the commissioners shall cause the boundaries of the district assigned to such chapel to be enrolled in the high court of chancery, and in the registry of the diocese; and no such chapelry shall become a benefice by reason of any aug-

mentation of the maintenance of the curate, by any grant or bounty under any act for augmenting small livings. 59 G. 3. c. 134. § 16.

All acts, laws, and customs, relating to publishing banns of marriage, marriages, christenings, churchings, and burials, and the registering thereof, and to all ecclesiastical fees, oblations, or offerings, shall apply to all districts, and consolidated or district chapelries and divisions of any parishes or extra-parochial places, whereof the boundaries shall be enrolled in chancery under the provisions of said act and this act; and in the churches and chapels whereof banns shall be allowed to be published, and marriages, christenings, churchings, or burials shall be allowed to be solemnized, and to the churches and chapels thereof, and to the ecclesiastical persons having cure of souls therein, or serving the same, in like manner as if the same had been ancient separate and distinct parishes and parish churches by law. § 17.

Every apportionment of glebe, tithes, moduses, and other endowments and emoluments, and of any fees, oblations, offerings, or other ecclesiastical dues or profits, and of all other charges under the said act or this act, and also the description of boundaries assigned to chapels under this act, in which no marriages shall be allowed to be solemnized, and all tables of fees made under this act, shall be registered in the registry of the diocese, and not enrolled in chancery. § 18. See GRANTS, PATRONAGE, JURISDICTION, SITES.

Converting DISTRICT CHAPELRIES *made under these acts into* SEPARATE *parishes, or into* DISTRICT *parishes.* It shall be lawful for the commissioners, with consent of the ordinary, patron, and incumbent, or on refusal of the incumbent, with consent of the ordinary, on the next avoidance, to convert any district chapelry made under said acts, into a separate and distinct parish for ecclesiastical purposes, or into a district parish, where a suitable residence and competent maintenance can be procured and established for the minister and his successors; and compensation shall be provided to the satisfaction of the commissioners and incumbent, for all fees, oblations, offerings, and ecclesiastical dues, which may by such conversion be transferred to the minister of such separate and distinct or district parish; and such conversion shall be made under the seal of the commissioners, and registered in the registry of the diocese, and enrolled in chancery, and a duplicate lodged in the chest of the church of the original parish, and in the church or chapel of the separate or district parish. 3 G. 4. c. 72. § 16.

Where marriages are allowed under said acts to be solemnized in any chapel of a district chapelry, and where the parties, or either of them, shall reside in the district of the chapelry,

or in any other district of a chapelry, the banns of marriage shall be published in the chapels of the districts in which the parties reside; and no publication of such banns in any other church or chapel shall be legal. 3 *G.* 4. *c.* 72. § 17.

All acts of parliament, laws, and customs, relating to publishing banns of marriage, and to marriages, christenings, churchings, and burials, and the registering thereof, and to all ecclesiastical fees, oblations, or offerings, shall apply to all extra-parochial places, and to all divisions and districts thereof, in and for which any churches or chapels shall be built or appropriated under the acts, and to the churches and chapels thereof, and to the ecclesiastical persons serving them, in like manner as if they had been ancient separate parishes and churches. § 18.

As soon as banns may be published, and marriage solemnized in any church or chapel under the acts, the bishop shall certify the same, and such certificate shall be kept in the chest of the church or chapel, with the books of registry thereof, and a copy shall be entered in the said books, and a duplicate of such certificate shall be registered in the registry of the diocese; and such certificate shall be conclusive evidence in all questions relating to banns published, or marriages solemnized in any such church or chapel, that the same might by law be published and solemnized therein; provided that no banns or marriages shall be void or voidable by reason of such certificate not having been duly given or registered, or entered as hereby required. § 19.

ENDOWMENTS.

It shall be lawful for the commissioners to convert any vicarage, or the separate divisions of any vicarage of any parish or place divided under the acts, into a rectory, in case the owners entitled in fee simple to the rectory or tithes, if an impropriate rectory, or the patron of a sinecure rectory so entitled, and also the incumbent of the sinecure rectory, if not then void, and the persons entitled to the absolute interest in any lease of the sinecure rectory, or the glebe or tithes thereof, shall be willing to restore, release, and reunite the tithes, glebe, and all other rectorial rights of such parish or place, or such proportion thereof as shall be satisfactory to the commissioners, to the incumbent of such parishes or places and his successors for ever; and every such release shall be made in such form and by such instrument as the commissioners shall direct; and the commissioners shall, by writing under their seal, direct such conversion to be made from the period specified in such instrument, and upon the conditions therein mentioned, which instrument shall be registered in the registry of the diocese, and enrolled in chancery; and such parishes or places shall for

ever therefrom be deemed to be rectories, without prejudice to the rights of other persons; and the incumbents of such vicarages shall be deemed to be the rectors of such parishes, or divided parishes or places, without any new induction, and shall have all such remedies for their tithes, glebe, and other rectorial rights, as if such parishes had been rectories, and such incumbents had been inducted as rectors therein; and the commissioners may, before any such transfer and division can be finally completed, accept and confirm any such restoration or release of tithes, and accept and record the consents or engagements of any impropriator, patron, or sinecure rector, incumbent and tenant (if any), and all such consents shall be binding upon their heirs, successors, executors, and administrators; provided that no incumbent shall be liable to the repair of more than one house of residence in any such parish or place; and when there shall be more than one such house, the bishop shall decide, order, and declare which shall be deemed the house of residence, and repaired as such; and the order of the bishop shall be registered in the registry of the diocese, and a duplicate deposited in the chest of the church or chapel. 3 G. 4. c. 72. § 13.

In case the commissioners shall think proper to convert into a rectory the vicarage of any parish or place, or separate division thereof, in which a new church shall be erected by virtue of the acts, and the possessors of the sinecure rectory for two or more lives, under a lease granted by the rector, with the consent of the patron and ordinary, shall be desirous of retaining any manor or hereditaments, being part of the glebe, and shall be willing to release his estate in the tithes and residue of the glebe, on condition that such manor and hereditaments shall be vested in him in fee simple, it shall be lawful for the commissioners, with consent of the patron entitled in fee simple and the incumbent, by any instrument under the seal of the commissioners, and sealed and delivered by the patron and incumbent (upon the execution by the possessors, patron, incumbent, and commissioners of such instruments, as mentioned in § 13., for releasing the residue of the rectorial tithes and glebe), to release the manor and hereditaments so retained to such possessors or their appointees, their heirs and assigns for ever; and such instruments shall be enrolled in chancery, and upon the execution thereof the fee simple of the hereditaments so conveyed shall be absolutely vested in the releasees, their heirs, and assigns, but subject to tithes as if the same had not been part of the glebe. § 14.

It shall be lawful for the commissioners, with the consent of the bishop and patron entitled in fee simple, where the commissioners may not deem it expedient to divide any parish for

ecclesiastical purposes, or create separate districts for ecclesiastical purposes therein, either to make a permanent rent charge on, or to apportion any portion not exceeding a moiety of the glebe lands, tithes, moduses, or other emoluments, for the benefit of the incumbent of or person serving such chapel; provided that the presentation of such endowed chapel shall be vested in the patron of the church to which the chapel appertains. 3 *G*. 4. *c*. 72. § 22.

It shall be lawful for the commissioners, by any instrument under seal, with the consent of the ordinary, patron, and incumbent of any parish or place in which any new church or chapel shall have been built or appropriated for the use thereof, instead of the old church or chapel thereof, under the acts, to authorize and direct the transfer of the endowments, emoluments, or rights, belonging to the old church or chapel, or the minister thereof, to such new church or chapel, the minister thereof, and his successors; and in every such case the trustees of the chapel, or of the emoluments or endowments belonging to any church or chapel, or to the incumbent thereof, are authorized and required to transfer the same, according to the direction of the commissioners; provided that the inhabitants of the parish or place in which such new church or chapel shall be built, shall raise and pay to the commissioners, towards the expences of such new church or chapel, either by subscription or rate, such sum at least as would have been necessary for the repair of the old church or chapel, in case the new one had not been built, and such further sum as the inhabitants of such parish or place would have been liable to raise for any purposes relating to repairing and maintaining such old church or chapel, or the cemetery thereof, or any other expences incident thereto, or to which such parish or place would have been liable in respect thereof, in case such new church or chapel had not been built; and after such transfer, all such tithes, emoluments, dues, and profits, and all lands, hereditaments, real or personal chattels, and all rights and privileges whatsoever, shall be vested in the parson or minister of the new church or chapel, and his successors, as amply as the parson or minister of the old church or chapel previously enjoyed the same; and every such transfer shall be registered in the registry of the diocese, and enrolled in chancery; and all laws and customs relative to publishing banns of marriage, marriages, christenings, churchings and burials, and the registering thereof, and to all ecclesiastical fees, oblations, and offerings, shall apply to the new church, in like manner as to the old church. § 30.

ENLARGEMENT.

Power for churchwardens, with consent of vestry and of the bishop and incumbent, to borrow and raise on the rates money necessary for or towards defraying the expence of enlarg-

ing or extending the accommodation in any then existing church or chapel, and to make rates for payment of the interest, and providing a fund of not less than the interest, for repayment of the principal, or repaying the principal in such other manner as shall be agreed on. *Provided* that *one-half* of the *additional accommodation* shall be allotted to uninclosed or free seats. 58 *G.* 3. *c.* 45. § 59.

EXCHEQUER BILLS.

The treasury may direct any number of exchequer bills, not exceeding the sum of 1,000,000*l.*, to be made out, according to 48 *G.* 3. *c.* 1., intituled, "An act for regulating the issuing and paying off of exchequer bills," to which the provisions of that act shall apply. 58 *G.* 3. *c.* 45. § 1, 2.

To bear interest not exceeding 2*d. per cent. per diem*, and to be payable at such periods as the treasury shall appoint, but within three years from the issuing thereof. § 3.

Not to be received in payment of taxes before the day appointed for their payment; but after that day to be current for taxes, and at the exchequer. § 4.

The treasury, on representation of the commissioners, may direct such portion of the exchequer bills as they find necessary to apply to the purposes of this act, to be issued by the auditor of the exchequer to the commissioners, who, on receipt of such direction, may direct to be delivered to the secretary of the commissioners, exchequer bills, payable at such periods and to such amount as in such direction specified; to bear date on the day such direction shall be received by the auditor, or such other day as specified in the direction, and to be signed by the auditor or any person authorized by him. § 5.

Lists of all exchequer bills made out and delivered to be given to commissioners by the officer delivering the same, specifying the dates, sums, periods of payment, persons to whom, and numbers of certificates by virtue whereof, same were made out and delivered. § 6.

On their credit bank of England may advance money to his majesty, at the receipt of the exchequer, not exceeding 1,000,000*l.* § 7.

The exchequer bills to be made out pursuant to said act or this act, shall bear such interest as may be directed by the lords of the treasury, not exceeding 3½*d. per cent. per diem* on the whole monies contained therein; and all such bills shall be made payable at such periods, and, with the interest due thereon, shall be paid out of such aids or supplies granted by parliament for the service of any year, as in every such exchequer bill shall be expressed, pursuant to such directions as shall be given by the auditor of the exchequer, by warrant from any three of the lords of the treasury. 59 *G.* 3. *c.* 134. § 1.

From time to time, as the commissioners shall find it necessary to apply any amount of exchequer bills, the commissioners shall represent the same to the lords of the treasury; any three of whom shall thereupon, if satisfied of such necessity, direct the commissioners to issue a certificate, signed by any three of them, to such person as may be authorized to receive the same, containing the amount so by the commissioners intended to be advanced by exchequer bills: which certificate shall be presented to the auditor of the exchequer, who shall immediately, on receipt thereof, deliver to the bearer thereof a like amount in exchequer bills; provided that the total amount to be issued by virtue of such certificates shall not at any time exceed the amount directed to be advanced under said act; and every such exchequer bill shall bear date on the day on which the certificate shall be received by the auditor, or on such other day as in such certificate shall be specified; and all such exchequer bills so to be delivered shall be signed by the said auditor, or in his name, by any person authorized to sign exchequer bills. 59 G. 3. c. 134. § 2.

EXPENSES

Of executing the act to be paid by the treasury, as shall be desired by the commissioners, in writing under their hands, and approved by the treasury; the same not to be subject to any tax, but an account thereof to be laid before both houses of parliament on or before 25th March in each year. 58 G. 3. c. 45. § 11.

Expenses of proceedings before a jury, by whom to be paid. § 40.

The court of chancery may order the expenses of paying purchase monies into court to be paid by the commissioners. § 49.

Commissioners may allow and make grants for defraying the whole of the expenses of building any churches or chapels under the provisions of said act or this act, in all cases in which the commissioners shall see fit, either on account of the inability of the inhabitants to bear any part of the charge of building any such churches or chapels, or from any other cause which shall, in the judgment and discretion of the commissioners, be sufficient. 59 G. 3. c. 134. § 4.

FEES.

It shall be lawful for the commissioners to make and fix any table of fees for any parish, with consent of the vestry or select vestry, or persons exercising the powers of vestry; and also to make and fix any such table of fees for any extra-parochial place, or in or for any district chapelry or parochial chapelry, in which any church or chapel shall be built or appropriated under said act or this act, with the consent of the bishop; and all fees so fixed may be recovered by the spiritual person, clerk, or sexton

to whom assigned, in like manner as any ancient legal fees of a like nature may be recovered. 59 *G.* 3. *c.* 134. § 11.

It shall be lawful for the commissioners, in any parish or place divided into district parishes or places for ecclesiastical purposes, with distinct district churches, to order and direct, with the consent of the bishop of the diocese, all or any proportion of the fees, dues, and emoluments, arising from the publication of banns and celebration of marriages, and from churchings and burials, and making, opening, or using any catacombs, vaults, or grounds for burial, in all or any such districts and divisions, to continue to belong wholly or in part, as the case may require, to the incumbent of the original church and chapel; and every such order shall be registered in the registry of the diocese, and a duplicate deposited in the chest of the churches or chapels of such parish or place: Provided that it shall be lawful for the commissioners, with such consent as aforesaid, within five years after making any such order, to annul or alter the same, or the appropriation made thereby; and such new order shall be registered in like manner. 3 *G.* 4. *c.* 72. § 12.

GRANTS.

Commissioners to make, in his majesty's name, grants for building, or to cause to be built churches or chapels, in such parishes or extra-parochial places only in which there is a population of not less than 4,000 persons, and in which there is not accommodation in the churches or chapels therein for more than one-fourth part of such population to attend divine service, according to the rites of the united church of England and Ireland, or in which there shall appear to the commissioners to be 1,000 persons resident more than four miles from any such church or chapel, and in which the commissioners shall be satisfied of the inability of the parishioners to bear any part of the charge of such building, in addition to the charge after mentioned (§ 14.); and to make grants or loans to assist in building such churches and chapels, in such other parishes or places as may contain a like population, and may equally require further accommodation for divine service, but in which the commissioners may deem the parishioners capable of bearing a part of the expense of erecting such churches and chapels, or of repaying the same by instalments, if advanced by way of loan. 58 *G.* 3. *c.* 45. § 13.

To parishes and places offering to contribute or raise, by rates or subscriptions, or both, such proportion of the expense of building any church or chapel as shall have been fixed by the rules of the commissioners, or shall be deemed by them a proper proportion, they may grant the remaining sum necessary to build any such church or chapel, and may advance and lend to such parish or place any part of the proportion proposed to be raised by rates. § 14.

In the selections of parishes and extra-parochial places for grants of money, commissioners to have regard to the amount of their population, and the disproportion between the number of inhabitants and the present accommodation for attendance on divine service, and to the proportion of the expense of affording the accommodation required, which shall be offered to be contributed or raised in aid of the act, and to the pecuniary ability of the inhabitants; and in giving preference, as between parishes and places not contributing any proportion of the expense, commissioners to have regard to the order of priority in which parishes and places under similar circumstances, as to population and present accommodation, shall have given notice to the commissioners of having provided sites for new churches. 58 *G.* 3. *c.* 45. § 15.

Recites that many parishes are divided into townships, hamlets, vills, chapelries, and other divisions, which are often large and populous, and it is therefore expedient that the commissioners shall be empowered to consider divisions of parishes as parishes for the purposes of the said act and this act; and enacts that the commissioners may make grants or loans, or grants and loans, to any such divisions of parishes as may, in their judgment, from their population, require further accommodation for divine service, although the population of such division may not amount to 4000, and although, in the whole parish, there may be accommodation for more than one-fourth part of the inhabitants; and the commissioners may, in every such case, proceed, in relation to any such divisions, under said act and this act, as if they were separate parishes: and all the provisions in said acts for enabling the commissioners to make grants or loans to any parishes or extra-parochial places, shall extend to such divisions of parishes as effectually as if they were separate parishes, and as if all the powers in said acts relative to parishes were re-enacted as to such divisions. 59 *G.* 3. *c.* 134. § 5.

It shall be lawful for the commissioners to make or confirm any grants for any church or chapel, relative to which any trusts have been created by act of parliament, deed, or instrument of consecration, which may not, in all respects, concur with the provisions of the acts, and to declare that such trusts shall, notwithstanding, remain in force; provided that the commissioners shall enter in their proceedings the special grounds upon which every such grant has been made and confirmed. 3 *G.* 4. *c.* 72. § 33.

Where grants have been made of land without any pecuniary consideration, which the commissioners shall determine not to apply to any of the purposes of the acts, it shall be lawful for them to exchange such land for other land more eligible for the purpose; or with consent of the grantors, their heirs, or successors, to apply such land to other ecclesiastical purposes, for the use of the incumbent, or for any charitable or public purpose

relating to such place, or to reconvey, without any pecuniary consideration, such land, or any part thereof, to the grantors, their heirs or successors. 3 *G*. 4. *c*. 72. § 34.

JURISDICTION.

Act not to invalidate any ecclesiastical law or constitution of the church, or any rights or powers of the bishop, archdeacon, chancellor, or official; but they may exercise ecclesiastical jurisdiction in all parishes to be erected or divided by virtue of the act, as in other parishes within their jurisdiction. 58 *G*. 3. *c*. 45. § 84, 85.

This act shall not affect any provisions in any acts passed in the last or present session, relating to any particular parish or place, or authorize the commissioners to make any regulation to affect the provisions of such local act. 3 *G*. 4. *c*. 72. § 36.

The acts, or any thing done under their authority, shall not invalidate any ecclesiastical law or constitution of the church of England, or any rights or powers of any bishop, archdeacon, chancellor, or official; but they may severally exercise ecclesiastical jurisdiction in all parishes to be erected or divided by virtue of this act, and in every division or district into which any parish may be divided, under the acts and in relation to every church and chapel within the same, as in other places within their jurisdictions. § 37.

LOANS.

It shall be lawful for the commissioners to lend and advance, to any parish or place, any sum they may think expedient, for or towards building or rebuilding any church or chapel, or payment of any expenses on any contract for any such building or rebuilding, or for or towards enlarging or improving any church or chapel, or purchasing any land for the site of any church or chapel, church or chapelyard or cemetery, or enlarging any such site, or for executing any other the purposes of the acts, for any term the commissioners shall think fit, upon payment of interest, or without interest, if under the special circumstances they shall think it expedient for any part or the whole of the term, as the commissioners shall judge proper; and such loans and advances shall be repaid at such times, in such manner, and by such instalments, as shall be settled by the commissioners, and shall be charged upon the church rates of the parishes or places, or upon rates to be made for that purpose, as is provided by said acts, in relation to advances thereby authorised; and all such advances, when repaid to the commissioners, with the interest, shall be applied to the purposes of the acts; and the church or chapel wardens are thereby authorised and required to declare any such and every other loan or advance under the acts, to be charged upon the church rates of such parish or place, by any instrument in the form therein set forth, or in such other form as the circumstances shall require.

Form of the charge upon church rates set forth. 3 *G.* 4. *c.* 72. § 5.

NOTICE.

The death or avoidance of the spiritual person who was the incumbent of the church of any parish or place in which any separated parish or district church or chapel shall be consecrated, at the time of consecration shall be notified by the bishop, under his hand and seal, to the spiritual person then serving the church or chapel, and the churchwardens of the parish or place; and such notification shall be preserved with, and copies thereof entered in, the books of registers of marriages, births, and burials of the church of the parish or place, and in the books of registers to be provided for entering the publications of banns and solemnization of marriages, and the baptisms and burials in such chapels; and such entries shall be authenticated by the churchwardens, and shall be sufficient evidence of the period of commencement of such service under this act, of the publication of banns, and solemnization of marriages and baptisms, and performance of burials in any such chapel, or any cemetery thereof. 58 *G.* 3. *c.* 45. § 29.

PARLIAMENT.

Accounts shall annually be laid before both houses of parliament, of the progress made by the commissioners in execution of the act, stating the number of churches or chapels built or building, the stipends assigned to the incumbents or curates thereof, the money expended, and for what purposes; and all other particulars necessary for explaining the progress in executing the act. 58 *G.* 3. *c.* 45. § 81.

Commissioners, in any case where they shall deem it proper, may pay, out of the money in their hands, any fees, due in either house of parliament, for passing any local act for more effectually carrying into execution any of the purposes of this act. And such acts shall in all other respects be considered as public acts. 59 *G.* 3. *c.* 134. § 41.

PATRONAGE.

The nomination or appointment of the spiritual person to serve all district churches and chapels shall belong to the patron of the parish or place out of which the district shall be taken; and the spiritual person so presented and instituted, or licensed by the bishop, shall be subject to the same jurisdiction and visitation as the incumbent of the parish. 58 *G.* 3. *c.* 45. § 67.

Where chapels shall be built wholly or in part by rates, the nominations of the minister shall be in the incumbent of the church. § 68.

The act not to affect the right of the principal and scholars of the king's hall and college of Brazen Nose, in Oxford, to present clerks to all churches or chapels in the parish of Stepney, Middlesex. § 69. See DIVISION. SERVICE (additional).

The right of patronage of incumbents of churches in parishes created by complete division, shall belong to the patron of the church of the original parish, after death of the existing incumbent, except where the division shall have been made or declared by the commissioners before or during avoidance, in which cases such right shall commence upon consecration of the church of such division; and the churches erected in and for such divisions shall, upon consecration, become benefices, and be subject to the laws in force concerning presentations and lapse, and holding benefices and churches: Provided that the spiritual care and superintendence of every parish, so divided, during avoidance, shall, until incumbents be appointed, continue in the incumbent of the original parish, who shall receive all emoluments within the parish during such superintendence. 59 *G.* 3. *c.* 134. § 13.

All corporations, incapacitated and other persons, entitled to or interested in any right of patronage or presentation to any benefice, donative, perpetual curacy, or appointment of any spiritual person to the performance of any ecclesiastical duties, in any church or chapel, are authorized to surrender any such right, or make agreements relating thereto, with the commissioners or the bishop for regulating the same according to this act; and they respectively may endow any chapel heretofore built, out of the pew rents thereof. § 15.

It shall be lawful for all corporations, tenants for life, trustees, and other persons possessed of or interested in any right of patronage to any benefice, donative, or the appointment of any spiritual person to any church or chapel, or the performance of any ecclesiastical duties therein, or the trustees of any endowments, or any emoluments for the use of any church or chapel, or the incumbent thereof, to surrender any such patronage or appointment, endowments or emoluments, or to enter into any agreement relating thereto, with the commissioners and bishop, and to attach any contiguous division of any parish or place, with the consent of the patron and incumbent thereof, to any such chapel, for better enabling the commissioners to convert any such church or chapel into the church, parochial chapel, or chapel of ease of a district parish or chapelry, and to convert any chapelries or other divisions into districts or separate parishes for ecclesiastical purposes. 3 *G.* 4. *c.* 72. § 15.

Where the commissioners shall build or aid the building of any new church or chapel, in any parish or place in which the patronage of the ecclesiastical person to serve such church or chapel shall not belong to any corporation, trustees of a public or charitable institution, or to any private person, it shall be lawful for the commissioners, by instrument under seal, to declare that such patronage shall either for ever, or for such time and in such manner as the commissioners shall direct, be exercised by

the bishop of the diocese of such parish or place; or if exempt from such jurisdiction, by the bishop of the diocese in which the place shall be locally situate. § 16. See ENDOWMENT.

PEWS.

Before consecration of any church or chapel under the act, a seat or pew sufficient to hold six persons at least shall be set apart in the body or ground floor of the church or chapel, near the pulpit, for the use of the minister and his family; and other seats, not among the free seats, for not less than four persons, for the minister's servants; and that pews, sittings, or benches, in every such church or chapel, to be marked with the words "Free Seats," amounting to not less than 1-5th of the whole sittings in every such church or chapel, which shall be built wholly or in part out of any rates, or with money raised on the credit of any rates, shall be appropriated for the use of poor persons resorting thereto, for ever; upon which pews or sittings no rent shall be charged. 58 *G.* 3. *c.* 45. § 75.

All subscribers being parishioners to any church or chapel, built under this act, shall have choice of pews at the rates fixed by the commissioners, in the order of their amount of subscription, and of the same amount in the order of their subscription. § 76.

Church or chapel wardens of any additional church or chapel shall not let or sell any pews and seats, except to parishioners, during their continuing inhabitants of the parish; and every sale of any pew or seat shall be subject to the reserved rent fixed under said act or this act, and shall be by private contract, and not by public auction. 59 *G.* 3. *c.* 134. § 32.

Commissioners may discharge any subscribers towards building any church or chapel, wholly or in part, from payment of pew rents for a limited time or for life, in proportion to their subscriptions, as commissioners shall see fit; and they may allow any subscriber, if he remove from the parish, to assign the remainder of such term to any other parishioner inhabiting the parish. § 33.

It shall be lawful for the commissioners to transfer any rights to pews, with the consent of the owners thereof, in any church or chapel belonging to any person residing in any division of a parish or place in which a new church or chapel shall have been built, acquired, or appropriated under said acts, to the church or chapel of the division in which such persons shall reside, for enabling the commissioners to make free seats in the church or chapel from which such rights shall be transferred; and the persons from whom pews shall be so taken, and to whom other pews shall be assigned by the commissioners in any other church or chapel, shall have the same rights to the pews so assigned, as they had in their former pews, or such right or title as shall be directed in such assignment, without faculty or other process;

and every such assignment shall be registered in the registry of the diocese, and a duplicate deposited in the chest of the church or chapel in which pews shall be assigned, but no greater right shall be given to any pew by such transfer than belonged to the owner or occupier of the pews in respect whereof such transfer shall be made. 3 *G.* 4. *c.* 72. § 23.

In case any lessee of any pew or seat for a longer term than one year, shall cease to be an inhabitant of the parish, place, division, or district, or shall not attend at the church or chapel for one year, his lease shall determine at the end of the then current year. § 24.

PEW RENTS.

Commissioners may make orders as to the amount of rents for pews or seats; and the produce thereof shall form a fund, out of which provision shall be made for the minister and clerk. 58 *G.* 3. *c.* 45. § 63.

Pews or seats in every church or chapel built under the act (except those set down as free seats) to be charged with the yearly rents set opposite the figures or numbers marked upon them in a list or schedule, to be made and signed by the commissioners, and annexed to the deed of consecration; such rents to be paid by the occupiers of the pews or seats to the persons appointed by the churchwardens, by two payments, on Monday after 25th December, and on 24th June, in the vestry room, between nine in the morning and four in the afternoon. § 77.

Churchwardens, with consent in writing of the incumbent, patron, and bishop, may alter any such pew rents; and a new list or schedule of rents, and the pews or seats on which they are charged, shall be signed by the churchwardens, incumbent, patron, and bishop, and deposited with the deed of consecration. § 78.

If the rent of any seat or pew shall be unpaid for three months, and notice in writing demanding payment thereof shall have been given to the owner or occupier, the churchwardens may either enter upon and hold such seat or pew, or let the same to any other person, till the rent in arrear and all costs shall be paid; or otherwise to sell the same pews or seats by auction to the best bidder, and out of the money thence arising to pay the rent in arrear, with the costs, rendering the overplus to the owner; or the churchwardens may recover the rent in arrear by action, for use and occupation, against the owners or occupiers. § 79.

Commissioners, if they deem it expedient, may from time to time direct the rents of pews in any church or chapel built or acquired under said act or this act to be assigned to the parish or district, and received by the church or chapel wardens, who shall pay the stipend to the minister and clerk: Provided that the parish shall not be answerable to such minister or clerk for

any greater sum in each year than the rent of the pews actually let during the preceding year: and any surplus of the pew rents, after paying such stipend and other expences, shall (except as mentioned in § 27.) be invested in government securities, in the names of trustees to be appointed by the bishop, and accumulated as a fund; 1st, For building or purchasing a house, with consent of the bishop, for the residence of the spiritual person serving the church or chapel. 2dly, For augmenting his stipend, reducing the pew rents, or increasing the accommodation in such church or chapel, in manner directed by the bishop. 59 *G.* 3. *c.* 131. § 26.

Provided that the surplus of such pew rents, after paying the stipend and expences mentioned in § 26., shall, if commissioners think it expedient, be applied towards payment of any money borrowed at interest by annuity or otherwise, for building any church or chapel, or purchasing for it any site, and defraying all expences relative thereto, and in repairing such church or chapel; and the residue of such pew rents, if any, shall be applied as directed in § 26., or in aid of the church rate, if the commissioners shall so think fit; and the church or chapel wardens, with consent of the commissioners, may borrow at interest, by annuity or otherwise, any money for building such church or chapel, or purchasing such site, or defraying the expences relative thereto, upon the credit of such pew rents; and by writing under their hands, may charge such pew rents, subject to such stipend and expence as aforesaid, with payment of any such money with interest or with annuities, as such church or chapel wardens shall think fit. § 27.

Church and chapel wardens of any church or chapel built or provided under said act and this act, are authorized and required, when directed by the bishop, with consent of the patron and incumbent, and where pew rents have been assigned to the parish with consent of the vestry, to make such alterations in any such pew rents as shall be directed or approved of with such consent. § 31.

Pew rents shall be payable in advance; *i. e.* one year's rent shall be paid on the admission to the pew or seat, if given at Lady-day or Michaelmas, or if at any intermediate period, then the proportion of the half year to Lady-day or Michaelmas, and a half year's rent above such proportion; and thereafter half yearly payments shall be made in advance, commencing on Lady-day or Michaelmas following the taking; and every such pew and seat shall be forfeited, and become vacant, by discontinuing any such payment in advance for two following half years. § 32.

In every case in which pew rents shall be fixed under the provisions of said acts, notice shall be given for six successive

weeks at the end of each year, of all the pews vacant, or which shall become vacant at the commencement of the next year, by writing affixed on the doors of the church or chapel, and vestry room; and all pews not taken at the rents fixed, within 14 days after the commencement of the ensuing year, shall be let to any inhabitant of any adjoining parish or place, in the churches or chapels of which there shall not be sufficient accommodation for the inhabitants thereof, at the rent fixed upon such pews, for any term not exceeding the end of the year, when such pews shall be again let in manner aforesaid, and so from year to year. 3 *G.* 4. *c.* 72. § 21.

POSTAGE.

Commissioners may receive and send all letters and packets relating to the execution of the act free from duty of postage, provided the letters received be directed to "His Majesty's "Commissioners appointed under the act for building and pro- "moting the building of Additional Churches;" and those sent be dated from their office, and signed on the outside by such person as the commissioners shall appoint, with the consent of three of the commissioners of his majesty's treasury, under such regulations as they shall direct. 58 *G.* 3. *c.* 45. § 82.

PREAMBLE

To 58 *G.* 3. *c.* 45. recites, that the population of Great Britain, and more particularly in and near the metropolis, and in other cities and great towns, has greatly increased, and the existing churches and chapels therein, and in many great and populous parishes and extra-parochial places, are inadequate to the accommodation of the inhabitants:

That it is necessary such evil should be remedied, and additional churches and chapels for the celebration of divine service, according to the rites of the united church of England and Ireland, as by law established, should be erected and maintained in such parishes and places, and that a certain number of free seats should be made therein:

And that the prince regent, on behalf of his majesty, was desirous of aiding his subjects in establishing additional churches, in such parishes and places as may require the same.

To 59 *G.* 3. *c.* 134. recites 58 *G.* 3. *c.* 45. And that it is expedient some of its provisions should be amended, others enlarged, and other provisions made for rendering it effectual.

To 3 *G.* 4. *c.* 72. recites 58 *G.* 3. *c.* 45, and 59 *G.* 3. *c.* 134. And that it is expedient some of their provisions should be amended, others explained and enlarged, and further provisions made for rendering those acts more effectual.

RATES.

All money expended in purchasing sites, and advanced by

commissioners to any parish, under the act, or paid by commissioners, in cases of neglect to provide sites, and all sums expended or advanced under the act in carrying the purposes thereof into execution, shall be charged on the church rates; and the churchwardens are required and empowered to make sufficient rates for repaying such expences and advances within the periods or at the times specified by the commissioners. 58 *G.* 3. *c.* 45. § 56.

Where money shall have been expended in purchasing sites, or advanced by commissioners, under the act, for extra-parochial places, in which no church rate shall be made, any justice, on the requisition of the commissioners, shall appoint two or more persons to make and levy rates for making all payments and repayments as may be required under the act, who shall have the same powers as churchwardens; and all such rates shall be deemed church rates, and all laws relative to church rates shall be applicable thereto. § 57.

Power for churchwardens in parishes, with consent of the vestry and persons appointed in extra-parochial places, with consent of the majority of persons who would be entitled to vote in a vestry, with notice given in the church or chapel therein, or nearest thereto, to borrow money on the rates, and to raise by rates money sufficient to pay the interest, and one-twentieth of the principal, until the whole money borrowed shall be repaid. § 58.

No application to build or enlarge any church or chapel, wholly or in part, by means of rates, shall be made, unless the major part of the inhabitants and occupiers assessed to the poor, in vestry assembled, shall consent thereto, or where the parish shall be under the care of a select vestry or body, with the consent of four-fifths thereof; such consents to be certified to some justice by an overseer of the poor; nor unless two-thirds in value of the proprietors of lands within such parish (whether for estates of freehold or copyhold, or by virtue of leases for terms of not less than fifteen years absolute, or determinable upon a life or lives) shall have consented thereto; such consents to be given by writing under the hands of all persons and corporations sole, and of the president or head member of corporations aggregate, and of the husbands, guardians, committees, trustees, attornies, or agents of femes covert, minors, insane persons, and persons out of the kingdom, and of the major part of the trustees for any charitable or other purpose. § 60.

Power for churchwardens of any parish or place in which any church or chapel shall be built, on such application as aforesaid (v. § 60.) to make rates for raising the sum or portion of the sum proposed to be defrayed by rates, or to borrow any such sums on the credit of such rates; and in every

such case to make rates for payment of the interest of any monies advanced for building any church or chapel on credit of the rate, and for providing a fund of not less than the amount of the interest for repayment of the principal, or for repaying such principal in such manner as shall be agreed upon. 58 *G.* 3. *c.* 91. § 61.

Any church or chapel warden of any parish or division, or consolidated or district chapelry, in which rates shall be made under said act or this act, may recover such rates, by all such ways and means as church rates may be recovered by, as fully as if they were hereby specially given: Provided that church or chapel wardens appointed under said act or this act, shall not in virtue of such office be deemed overseers of the poor. 59 *G.* 3. *c.* 134. § 23.

After reciting so much of § 60, as requires the consent of two-thirds in value of the proprietors, enacts that such recited provision shall be repealed, and that no application to build or enlarge any church or chapel, wholly or in part, shall be made, nor shall any church or chapel be built, rebuilt, or enlarged, or any purchase made of any new or additional burial ground, by means of rates on any parish where one-third in value (to be ascertained by an average of the poor's rate for the preceding three years) of the proprietors of tenements in such parish, whether for estates of freehold or copyhold, or for terms of years absolute, whereof fifteen years shall be unexpired, or determinable on a life or lives, shall dissent therefrom; such dissent to be entered in the book containing the proceedings of the vestry, and to be signified, in case of any future vestry, within two months after the resolution; and in case of any such resolution already passed, within two months from passing this act, under the hands of such proprietors as aforesaid, and of the president, head, or chief member of any corporations aggregate, and of the husbands, guardians, committees, trustees, attornies, or agents of any femes covert, minors, persons insane or absent from the kingdom, and of the major part of the trustees of any charitable institution, or of any part of them authorised to act in the trusts. § 24.

It shall be lawful for the inhabitants of any parish assembled at any vestry, or the major part of the inhabitants so assembled, of which notice shall have been given on two successive Sundays preceding, or for two-third parts of such of the persons exercising the powers of vestry as shall be assembled at any meeting, of which notice shall have been given as notices for assembling such persons are given, to order and direct the making and raising of any rate not exceeding one shilling in the pound in any one year, or five shillings in the pound in the whole, upon the annual value of the property in the parish, for the purpose

of building or enlarging any church or chapel, either wholly or in part, by means of rates, without any further or other or greater number of consents of any number of inhabitants or proprietors, or occupiers, or other persons: Provided that no larger rate than aforesaid shall be directed to be raised in relation to any application to build or enlarge any church or chapel, either wholly or in part, by means of rates, if any such proportion of dissents, as in § 24 is specified, are signified as there directed; and every such direction shall be imperative upon the church or chapel wardens, who shall forthwith make and raise the rate so ordered; and every such rate shall be made, raised, levied and accounted for, in like manner, and with all such powers and under such penalties as are in law applicable to church rates. 59 *G.* 3. *c.* 134. § 25.

When any parish shall be desirous of increasing the accommodation in the parish church, and it shall be expedient to take down the existing church, and to rebuild it on the same or a more convenient site, it shall be lawful for the churchwardens, with the consent of the vestry, or persons possessing the powers of vestry, and of the ordinary, patron, incumbent and lay impropriator, if any, to take down such existing church, and to rebuild it on same or a new site; and the churchwardens may borrow on credit of the church rates, or any rates made under said act or this act, money necessary for defraying all or any part of the expence of taking down and rebuilding such church, and to make rates for paying the interest of the money so borrowed, and for providing a fund not less than the amount of the interest for repaying the principal, or for repaying such principal, at such times and in such manner and proportions as shall be agreed upon with the lenders: Provided that no church shall be so taken down and rebuilt, by means of rates, if such proportion of dissents as in § 25 specified, are signified in writing as thereby directed; and such church, when consecrated, shall be the parish church for celebrating divine offices, and solemnizing marriages: Provided that one-half of the additional accommodation obtained by rebuilding such church, shall be set apart for free and open sittings, and that persons enjoying pews or sittings in the church, held in virtue of any faculty or prescription, shall have pews or sittings, as near as may be, in the same situation and of like dimensions, allotted for them in such new church; and that all tombstones, monuments, and monumental inscriptions in the old church, shall be carefully preserved by the churchwardens, and shall be set up by them at the charge of the parish, in the new church, as near as circumstances will admit, in the situations from whence they were removed in the old church. § 40.

REPAIRS.

The repairs of district churches or chapels shall be made by the districts to which they belong, by rates to be raised within the districts, in like manner as repairs of churches by parishes, and such district shall be deemed a separate parish for that purpose; and the repairs of chapels not made district churches, shall be made by the parish in or for which the chapels shall be built. 58 G. 3. c. 45. § 70.

Districts shall remain subject to the repair of the original parish church, for twenty years after the district church shall be consecrated, after which the parish church shall be repaired by the remainder of the parish; and each district shall afterwards make separate rates for such repairs, as if separate parishes. § 71.

It shall be lawful for the churchwardens of any parish, with consent of the vestry, bishop, and incumbent, to borrow and raise on credit of the church rates, or any rate made under said act or this act, money necessary for defraying the expense of repairing any churches or chapels; and where such money shall have been borrowed, to raise by rate a sum sufficient, from time to time, to pay the interest of the money so borrowed, and not less than 10 *per cent.* of the principal out of the produce of such rates, until the whole money borrowed shall be repaid. 59 G. 3. c. 134. § 14.

All chapels acquired and appropriated, or built or enlarged and improved under said acts, or under any local acts, wherein no provision is made relating thereto, in aid of the churches of the parishes or places in which they shall be situated, (whether or not any districts of such parishes shall have been assigned to such chapels for ecclesiastical purposes,) shall be repaired by the parishes or places at large to which such chapel shall belong, and rates shall be raised for that purpose, in like manner as for the repair of the churches of such parishes or places; and all the laws in force for making and raising rates for the repair of churches, shall be applied for making and raising rates for the repair of such chapels. 3 G. 4. c. 72. § 20.

It shall be lawful for the commissioners, in any case in which any division of a parish previously divided under the acts should be again divided, and on which any church or chapel shall be built or acquired and appropriated for the use of such new division, by any instrument under the seal of the commissioners, to declare, that all liability to repair the church or chapel of the division from which such new division shall be made, shall cease from the period specified in such instrument; and after such period, the new division shall be liable only to repair the church or chapel built therein, and to repair the

church of the original parish, for the then residue of the 20 years, under 58 *G.* 3. *c.* 45. § 71. § 21.

RULES.

Commissioners to draw up rules for their general proceedings; and to fix therein the largest amount of allowances to be granted for building any church, and to make such other regulations as they deem expedient for furthering the purposes of the act; with powers to vary or add to them: rules to be laid before his majesty in council, who may approve or disallow them. 58 *G.* 3. *c.* 45. § 12.

SERVICE (ADDITIONAL.)

If the bishop shall think a third or additional service (being either the morning or evening service, with a sermon) expedient in any church or chapel, either previously existing or to be provided under the act, he may require the incumbent to nominate to him a proper person to be licensed as a curate for the performance of such additional service; who shall within six months after such requisition nominate such curate to the bishop to be licensed; and in default thereof the bishop is empowered to nominate and license such curate; and the bishop may require the churchwardens to let, for such additional service, such proportion of the pews, not held by faculty or prescription, and at such rates as will afford a competent salary to such curate; and the churchwardens are empowered and required so to let the same, and to raise and levy the rents as directed by this act, reserving such number of sittings as free seats, as to the bishop shall appear expedient, not being less than one-fourth: But if any persons shall represent to the bishop, that they will provide by subscription such annual sum as may be sufficient to afford a competent salary to the curate for the performance of such additional service, and the bishop shall be of opinion that such mode of providing a salary for such curate is more expedient than raising the same by pew rents, the bishop may require the incumbent to nominate a curate to him as aforesaid, and in default may appoint a curate himself, such curate to be subject to the like jurisdiction and laws as stipendiary curates, except as to their salaries, which are to be regulated by this act. 58 *G.* 3. *c.* 45. § 65.

Such subscribers (being parishioners) to have the option of any pew, not held by faculty or prescription, for the time of such additional service, according to the amount, and if equal, the date of their subscriptions, and shall hold such pew so long as they pay such subscriptions, and no longer. If the subscriptions shall not produce what the bishop shall deem a competent salary for such curate, the bishop may authorize and require the churchwardens to raise, by letting pews, a sum to make up a sufficient

salary, which shall in no case, except when raised entirely by subscription, exceed 80*l*. § 66.

SITES.

Commissioners may accept buildings proper to be converted into additional churches or chapels, and lands proper for sites of additional churches or chapels, not exceeding in quantity, in one place, sufficient for building a church or chapel, providing a churchyard, and making access thereto, from persons willing to give the same. Sites, when conveyed to the commissioners, and churches erected thereon, and notice thereof given to the bishop, shall for ever after be devoted to ecclesiastical purposes only, in order to be consecrated by the bishop to public worship. Commissioners may also accept any house, garden, and appurtenances not exceeding ten acres, for the residence of the spiritual person serving such church or chapel, or any land not exceeding ten acres, for erecting such house, and making such garden; and the same shall, after consecration of such church or chapel, be the house and glebe belonging thereto, and vest in the incumbent for the time being. 58 *G.* 3. *c.* 45. § 33.

His Majesty and corporations empowered to grant buildings or sites for churches or chapels. § 34.

Parishes and extra-parochial places shall furnish sites, as required by the commissioners; and as soon as the commissioners shall have fixed that a church or chapel shall be built in any parish or place, they shall give notice to the churchwardens of their intention, and of the extent of ground required for the site and approach, and of the place in which the same are required; and the churchwardens shall, within fourteen days, call a meeting of the vestry or select vestry, for taking measures for providing such site and approach; and in case such parish or place shall not be able to provide the same without purchase, the vestry or select vestry may treat for the purchase thereof, according to such notice, but shall not conclude any bargain without the approbation of the commissioners. § 35.

Powers to corporations and incapacitated persons to sell and convey lands, set out for sites, unto the commissioners. § 36.

Form of conveyance. § 37.

Lords of manors authorized to convey commons or wastes. § 38.

If parties cannot agree, the amount of the purchase money to be settled by a jury. § 39.

Proceedings to settle the same by the verdict of a jury at the quarter sessions. § 40—42.

Power to enter lands on payment or legal tender of the purchase money. § 43.

Directing how purchase monies for settled estates shall be applied. § 44—48.

Mortgagees to convey to commissioners, on payment of principal and interest. 58 *G.* 3. *c.* 45. § 50.

Powers for commissioners to procure sites for parishes or places, enabled by act of parliament to build a church or chapel, or desirous of building or enlarging one without aid from the commissioners, and to charge the expence on the parish or place. § 52.

No dwelling house, offices, garden, orchard, yard, park, pleasure ground, paddock, or planted walk or avenue appurtenant thereto, to be taken without the consent of the owners and occupiers. § 53.

Commissioners may advance money to purchase sites, if circumstances require it, and shall assign periods for repayment by instalments within ten years. § 54.

If no site provided within six months after notice by the commissioners, they may purchase a site, and charge the expense upon the rate raised under this act; giving notice of the amount, and of the periods within which repayment by instalments would be required. § 55.

In every case in which the commissioners shall determine that any additional church or chapel shall be erected, it shall be lawful for them to require sites to be provided for them as directed by said act, and to grant or lend money for purchasing sites, and for erecting or to erect any building for celebrating divine service, without determining, before making such requisitions of sites, or of any such grant or loan, or before erecting any such church or chapel, whether the parish or extra-parochial place in which it shall be built, shall be divided into separate parishes or districts for ecclesiastical purposes, under said act, or whether any such building shall, after consecration, be deemed a church or chapel, or it shall be appropriated to the accommodation of the parish at large, or any particular division or divisions thereof. 59 *G.* 3. *c.* 134. § 7.

It shall be lawful for the commissioners, where they shall deem it expedient to grant money for purchasing sites, to treat for purchasing sites, or for building churches or chapels, with or without cemeteries, and without requiring repayment or security for repaying the money so granted or expended in purchasing sites or cemeteries, from the parishes or divisions for which sites shall be provided; and it shall be lawful for the commissioners to purchase or grant money for purchasing cemeteries not within the parish, or for enlarging cemeteries, or providing additional cemeteries within the parish; all which cemeteries, if not within the parish, shall, after consecration, be deemed part of the parish. § 22.

If any lands or hereditaments, acquired by the commissioners

by gift or otherwise, shall remain unconsecrated at the end of the ten years for which the present commission was granted, or at the determination of any commission granted by his majesty under said act or this act, such unconsecrated hereditaments shall be immediately vested in his majesty, his heirs and successors, to be applied for the purposes for which they were acquired, under the direction of his majesty in council, unless or until otherwise provided by parliament. 59 *G.* 3. *c.* 134. § 34.

It shall be lawful for the master general and principal officers of his majesty's ordnance, for the comptroller of the barrack department, and for the principal officers of any other public department, holding any hereditaments on behalf of his majesty, for the use of such department, by any conveyance, signed by the master general or any two principal officers of the ordnance department, or by the comptroller of the barrack department, or by one or more of any of the principal officers of any such other public department, and countersigned by any three or more of the commissioners of his majesty's treasury, and for any corporation, or for any trustees, guardians, commissioners, or other persons, having the control, care, or management of any hospitals, schools, charitable foundations, or other public institutions, by any conveyance signed by or under the seal of such body or corporation, to convey any hereditaments; and if they be copyhold, with the consent of the lord, to enfranchise the same; to be used as sites for churches or chapels, or for church or chapel yards or cemeteries, or enlarging the same, or for parsonages, or residences for ecclesiastical persons: and all such conveyances shall be made to the commissioners, or to whom they shall appoint, to be used for the purposes of the acts; and such grants may be made without valuable consideration; and all such conveyances shall be effectual, and all such grantors are thereby indemnified. 3 *G.* 4. *c.* 72. § 1.

Form of conveyance set forth, which shall be effectual to bar all estates tail, and other estates, titles, and incumbrances. § 2.

It shall be lawful for the commissioners to procure, or require parishes and places to provide, or to accept as gifts, and to take grants to themselves, or direct grants to be made to others, of any such land as in the judgment of the commissioners may be required, for enlarging or improving any church or chapel, and any land convenient for rebuilding any church or chapel, whether contiguous or not to the present site thereof; and all the powers in the acts, in relation to procuring lands, or requiring lands to be provided by any parishes or places for sites for additional churches, or any other purpose of said acts, shall extend to obtaining, requiring, or receiving, under the authority of the acts, any lands for the purposes aforesaid. § 3.

It shall be lawful for the commissioners, and for any parish or

place for which any act shall have been passed in relation to building, rebuilding, or enlarging any church or chapel, or enlarging or procuring any church or chapel yard or cemetery, to make any grants of loans, or give other aid or assistance in procuring sites for churches or chapels, or land for church or chapel-yards or cemeteries, or any addition thereto, and to apply all the powers of the acts for executing any of those purposes. 3 G. 4. c. 72. § 7.

In every case in which any parish or place shall not be able to procure land for building or rebuilding, or enlarging any church or chapel, or making or enlarging any yard or cemetery thereto, by reason of the inability of any persons or bodies interested therein to convey or make a good title to the same, free from incumbrances, or that any such persons or bodies shall be unwilling to treat, or cannot agree for the sale thereof, it shall be lawful for the commissioners, if they shall think proper, to take such land for any such purpose, for any such parish or place, and to apply the powers of the acts for assessing, ascertaining, and paying the value, and taking and giving possession of such land, as fully as if the same were re-enacted for those purposes. § 8.

After the expiration of five years from the conveyance of any lands to the commissioners, or any persons, for the use of any parish or place, as a site for any church or chapel, church or chapel yard or cemetery, the said land shall be absolutely vested in the commissioners, or such grantees, free from all claims of any body politic or corporate, or persons whatsoever. § 29.

It shall be lawful for the commissioners, in any case in which they shall deem it expedient, under the special circumstances of any place not within the provisions of the acts, to use and exercise all or any of the provisions thereof, relating to procuring any land for such parish or place, for any of the purposes thereof, provided that the commissioners shall enter in their proceedings the nature of the special grounds and circumstances under which they act. § 32.

STAMPS.

It shall be lawful for the commissioners of stamps to allow the full amount of the stamp duties upon any deeds or instruments made relative to purchasing or procuring sites, or building churches, or purchasing or providing materials for such buildings, under such regulations as shall be made by three of the commissioners of his majesty's treasury. 59 G. 3. c. 134. § 35.

No agreement, deed, or other instrument, made for any of the purposes of the acts, shall be subject to any of the duties upon stamped vellum, parchment, or paper. 3 G. 4. c. 72. § 28.

STIPENDS.

Commissioners may assign out of pew rents a proper stipend for the minister, with consent of the bishop, regard being had to

the extent and population of the district, and other circumstances; and commissioners may assign salaries to the clerks. If commissioners and bishop do not agree as to the amount of the stipend, the same to be settled by the archbishop. 58 G. 3. c. 45. § 64.

Every deed for securing a provision or salary to a spiritual person serving a church or chapel under this act, shall be enrolled in the court of chancery, and registered in the registry of the diocese. § 72.

VESTRY.

In every district parish, or division of a parish, or district chapelry, or consolidated chapelry, in which any church or chapel shall be built, acquired, or appropriated, under said act or this act, in which there shall not be a distinct vestry, a select vestry of so many persons as commissioners shall direct shall be appointed by the commissioners, with the advice of the bishop, out of the substantial inhabitants, for the care and management of the church or chapel, and all matters relating thereto; and such select vestry shall annually elect the church or chapel warden on the part of the parish or chapelry, and shall elect new members of such vestry as vacancies shall arise by death, resignation, or ceasing to inhabit the parish; and proper pews shall be provided for the use of the church or chapel wardens. 59 G. 3. c. 134. § 30.

Where any parish or place shall be divided into separate parishes for ecclesiastical purposes, or into separate districts or chapelries, in which select vestries shall be appointed by the commissioners, all members of the select vestry of the original parish, who shall reside in the district or division of the original church or chapel, shall continue to act as the vestry of such district or division, in all matters relating to such church or chapel, and the repairs thereof, or to any other ecclesiastical matters or things, or in the distribution of any proportion of any bequests, gifts, or charities, which may, under this act, be assigned to any such district or division; provided that no member of any select vestry shall, after such division, act in any manner relating to any church or chapel, or any other ecclesiastical matters or things, except such as relate to the division in which he shall reside; and if, by reason of such division, a sufficient number of such members of select vestry shall not remain resident in the division within which the original church or chapel shall be situate, according to the proportion fixed by the commissioners, (regard being had to the population of such division, and its relative population to that of the whole parish or place,) all such deficiencies shall be filled up as vacancies have before been filled up therein; provided that no person shall vote in supplying such deficiencies, unless resident within the division for which the members are to be chosen, provided that the persons chosen

shall not thereby be members of the vestry for any other purposes than such as relate to the division for which they shall be chosen, or for the distribution of any charitable gifts therein; provided that all the members of the select vestry of any such parish or place, resident in any other divisions thereof, shall be members of such vestries as shall be appointed under the acts for the divisions in which they shall reside. 3 *G.* 4. *c.* 72. § 10.

Churching of women. See Child-birth.

Church of England.

[See *Titles*, Ireland. Scotland. Wales.]

Ecclesiastical constitution.

1. THE ecclesiastical state of England, as it standeth at this day, is divided into two provinces or archbishoprics, of Canterbury and York. The archbishop of Canterbury is styled metropolitan and primate of all England, and the archbishop of York primate of England. Each archbishop hath within his province bishops of several dioceses. The archbishop of Canterbury hath under him within his province of ancient foundations, Rochester his principal chaplain, London his dean, Winchester his chancellor, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Coventry and Lichfield, Hereford, Llandaff, St. David's, Bangor, and St. Asaph; and [397] four founded by king Henry the eighth, erected out of the ruins of dissolved monasteries, Gloucester, Bristol, Peterborough, and Oxford. The archbishop of York hath under him four; the bishop of the county palatine of Chester, newly erected by king Henry the eighth, and annexed by him to the archbishopric of York, the county palatine of Durham, Carlisle, and the Isle of Man, annexed to the province of York by king Henry the eighth: but a greater number this archbishop anciently had, which time hath taken from him. And every archbishop and bishop hath his dean and chapter. The archbishop of Canterbury hath the precedence, next to him the archbishop of York, next to him the bishop of London, [next to him the bishop of Durham,] and next to him the bishop of Winchester; and then all other bishops of both provinces after their ancientness. Every diocese is parted into archdeaconries; and every archdeaconry is divided into deanries; and deanries again into parishes, towns, and hamlets. 1 *Inst.* 94.

King to be of the church of England. [See Popery.]

2. Whoever shall come to the possession of the crown of England, shall join in communion with the church of England, as by law established. 12 & 13 *W. c.* 2. § 3.

His oath to maintain it.

3. By the 1 *W. c.* 6. Oath shall be administered to every king or queen, who shall succeed to the imperial crown of this

realm, at their coronation, to be administered by one of the archbishops or bishops, to be thereunto appointed by such king or queen; that they will to the utmost of their power maintain the laws of God, the true profession of the gospel and protestant reformed religion established by law; and will preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them.

And by the 5 *An. c.* 5. The king at his coronation shall take and subscribe an oath to maintain and preserve inviolably the settlement of the church of England, and the doctrine, worship, discipline, and government thereof, as by law established. § 2.

Penalty of derogating from it.

4. By *Can.* 3. Whoever shall affirm, that the church of England by law established is not a true and apostolical church, teaching and maintaining the doctrine of the apostles, let him be excommunicated *ipso facto*, and not restored but only by the archbishop after his repentance and public revocation of this his wicked error.

And by *Can.* 7. Whoever shall affirm, that the government of the church of England under his majesty, by archbishops, bishops, deans, archdeacons, and the rest that bear office in the same, is antichristian, or repugnant to the word of God, let him be excommunicated *ipso facto*, and so continue until he repent, and publicly revoke such his wicked errors. [398]

And moreover, seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace; as where a person said, "Your religion is a new religion, preach-"ing is but prating, and prayer once a day is more edifying." 1 *Haw.* 7.

Church-scot.

THE church-scot, *cyryc-sceat*, was an oblation for the first-fruits of corn, payable at Martinmas. 1 *Still.* 176.

Churchwardens. (1)

AND herein also of *questmen*, *sidesmen*, or *assistants*. Note, the office of churchwardens, so far as it relates to the repairs

(1) Churchwardens are the guardians or keepers of the church, and representatives of the body of the parish. 1 *Bl. Com.* 394. Their duties were originally confined to the care of the ecclesiastical property of the parish over which they exercise discretionary power for specific purposes. Per Lord *Stowell*, 1 *Hagg.* 173.

or other matters concerning the church, is treated of under the title Church; their cognizance of crimes and offences falleth in under the title Visitation; and other branches of their duty under divers other titles respectively: here it is treated only concerning their office in general, or such other particulars as do not fall in more properly elsewhere.

Original. 1. In the ancient episcopal *synods* the bishops were wont to summon divers creditable persons out of every parish, to give information of and to *attest* the disorders of clergy and people. These were called *testes synodales;* and were in after times a kind of impaneled jury, consisting of two, three, or more persons in every parish, who were upon oath to present all heretics and other irregular persons. *Ken. Par. Ant.* 649.

[399] And these in process of time became standing officers in several places, especially in great cities, and from hence were called *synods men*, and by corruption *sidesmen:* they are also sometimes called *questmen*, from the nature of their office, in making *inquiry* concerning offences.

And these sidesmen or questmen, by *Can.* 90., are to be chosen yearly in Easter week, by the minister and parishioners (if they can agree), otherwise to be appointed by the ordinary of the diocese.

But for the most part this whole office is now devolved upon the churchwardens, together with that other office which their name more properly importeth, of taking care of the church and of the goods thereof, which they had of very ancient time.

Who are exempted from being church-wardens [(2) or may serve by deputy.]

2. All *peers* of the realm, by reason of their dignity, are exempted from the office of churchwarden. *Gibs.* 215.

So are all *clergymen*, by reason of their order. *Id.*

In like manner all *parliament men*, by reason of their privilege. *Id.*

If an *attorney* of the king's bench be made a churchwarden of the parish, he shall have a writ of privilege out of the king's bench, shewing his privilege to be discharged thereof, by reason of his attendance in the said court. *E.* 14 *C.* Felix Wilson, being an attorney of the king's bench, was made churchwarden of Hanwell, and he refused, and was sued in the spiritual court to take upon him the office; and a prohibition was granted. So in like manner, *T.* 15 *C.*, Mr. Barker being chosen churchwarden of Aldermanbury, in London, such writ was granted. 2 *Roll's Abr.* 272.

M. 21 *Ja.* Stampe, *clerk of the king's bench*, was chosen churchwarden of Kingston, and had a writ of privilege to the spiritual court, requiring them not to compel him to take the

(2) When one having privilege is chosen, a writ goes to the ecclesiastical court that he be not sworn. *Palm.* 392.

oath; which writ being disobeyed, he had a prohibition. 1 *Roll.* 368.

By the 6 *W. c.* 4. Every person that shall use and exercise the art of an *apothecary* within the city of London and seven miles thereof, being free of the company of apothecaries, and who shall be duly examined of his skill in the said mystery, and shall be approved for the same, shall, for so long as he shall use and exercise the said art, and no longer, be freed and exempted from all parish offices: and if he shall be chosen and elected into any such office, or be disquieted or disturbed by reason thereof, he shall, on producing a testimonial under the common seal of the [400] said corporation, of such his examination, approbation, and freedom, to the person by whom he shall be so elected or appointed, or by or before whom he shall be summoned, returned, or required to serve or hold any such office, be absolutely discharged from the same, and such nomination, election, return, and appointment, shall be void and of none effect. And all persons that shall use and exercise the said art of an apothecary within any other part of the realm, and have been brought up and served in the said art as apprentices for seven years, according to the statute of the 5 *El. c.* 4., shall be freed and exempted from all such offices within the several places where they live, so long as they shall use and exercise the said art, and no longer; and if any person so qualified shall be elected or chosen into any such office, such nomination, election, return, and appointment shall be void, unless he shall voluntarily consent and agree to hold the same. § 2, 3.

By the 1 *W. c.* 18., commonly called the act of toleration, if any person *dissenting from the church of England* shall be chosen or otherwise appointed to bear the office of churchwarden, or any other parochial office, and such person shall scruple to take upon him such office, in regard of the oaths or any other matter or thing required by the law to be taken or done in respect of such office, he shall and may execute the same by a sufficient deputy by him to be provided that shall comply with the laws in that behalf; provided, that the said deputy be allowed and approved by such persons and in such manner as such officer should by law have been allowed and approved. And every teacher or preacher in holy orders or pretended holy orders, that is, a minister, preacher, or teacher of a congregation, and duly qualified by the said act, shall be exempted from being chosen or appointed to bear the office of churchwarden, or any other parochial office. § 7. 11.

By the 10 & 11 *W. c.* 23. All persons who have *prosecuted a felon* to conviction, [and the first assignee of the certificate thereof, *repealed* by 58 G. 3. c. 70. § 2.] are exempted from the office of churchwarden in the parish where the offence was committed. § 2.

No person *living out of the parish*, although he occupies lands within the parish, may be chosen churchwarden; because he cannot take notice of absences from church, nor disorders in it, for the due presenting of them. *Gibs.* 215. But see *Stephenson* v. *Langston*, *infra.*

[If any *Roman catholic* is appointed to the office of churchwarden, and scruples to take it upon him in regard of the oaths or other matters required to be done therein, he may execute the same by a deputy who will comply; but such deputy shall be approved by such person in such manner as such officer should by law have been approved. 31 *G.* 3. *c.* 32. § 7.

Every *priest* as *minister*, &c. *of any congregation of catholics*, who shall take and subscribe the oath of allegiance, abjuration, and declaration, in 31 *G.* 3. *c.* 32. § 1. prescribed, shall be exempted from being chosen churchwarden. *Id.* § 8.

So an *alien* is disqualified to serve as a churchwarden. (3)

A *non-resident partner in a house of trade* is not exempted from serving the office of churchwarden in the parish where his house of business stands. (4) Thus in *The King* v. *Poynder, sen.* (5) *A.*, *B.* and *C.* carrying on trade in partnership, had a dwelling house, yard, and premises in a parish in London: all the partners were in the habit of frequenting the premises daily for the purpose of business, but none of them resided there. The dwelling house was inhabited by a clerk who managed the business for them; but the rent, rates, and taxes were paid by the firm. It was held, that each of the partners was a householder within the 43 *El. c.* 2., and liable to serve the office of overseer.

If a parish return a *papist*, a *jew*, or *child of ten years old*, or *person convicted of felony*, the ordinary would be bound to reject him. (6)]

[401] Chusing church-wardens.

3. By *Can.* 118. The churchwardens and sidesmen shall be chosen the first week after Easter, or some week following (*e*), according to the direction of the ordinary.

And by *Can.* 89. All churchwardens or questmen in every parish, shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the *minister shall chuse one* (7), and the parishioners

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(3) *Anthony* v. *Seger*, 1 *Hagg. Rep.* 9.

(4) *Stephenson* v. *Langston*, 1 *Hagg. Rep.* 379.

(5) 1 *Bar. & Cres. Rep.* 178.

(6) Per Lord *Stowell*, in *Anthony* v. *Seger*, 1 *Hagg.* 10.

(*e*) This is not so; for this canon relates only to *swearing* the churchwardens; but the time of their *choice* is by *canon* 90 to be in Easter week. *Serjt. Hill's MSS. notes.*

(7) A curate stands in the place of the parson for the purpose of nominating one churchwarden, and may make the presentment. *Hubbard* v. *Penrice*, 2 *Stra.* 1246.

another; and without such a joint or several choice, none shall take upon them to be churchwardens.

The books of common law interpret this with a limitation; namely, if a custom hath not been for the parishioners to chuse both. (8) In which case, when two have been chosen by the parish, on pretence of custom, and one by the incumbent on the foot of this canon, and the ecclesiastical judge hath refused to admit the swearing more than one of those who have been chosen by the parish, upon surmise of such custom, mandamuses have been frequently granted by the temporal courts to swear the person so elected by the parish: and also prohibitions have gone, in cases where the spiritual court hath attempted to try or overrule the custom, or otherwise to do any thing to the prejudice of that title. Upon which occasion it hath been said, that churchwardens are lay incorporations and temporal officers; and that of common right every parish ought to chuse their own churchwardens, which right is not to be overthrown but by proof of a contrary custom: and that although one is sworn, a writ may go to swear another in the same place, to the end both parties may be made capable to try the right. *Gibs.* 215. (*g*)

For, by *Coke* chief justice, a convocation hath power to make constitutions for ecclesiastical things or persons, but they ought to be according to the law and custom of the realm: and they cannot make churchwardens that were eligible to be donative, without act of parliament. And the canon is to be intended,

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(8) For *by custom* they may be chosen by the parishioners without the parson (2 *Roll.* 234. *l.* 15. *Warner*'s case, *Cro. Jac.* 532.), or by a select vestry. *Hard.* 379. Per Lord *Stowell*, 1 *Hagg. Rep.* 10. "The proper and regular method is, for the churchwardens to return two persons to succeed them; but this is not exclusive of other methods, and though customary, is not indispensably necessary, provided the court has satisfactory information of the election in any other way. Thus where at an election of churchwardens by parishioners in vestry, there was a shew of hands, and afterwards a poll was demanded, it is an abandonment of what was done before, and every thing anterior is not of the substance of the election, nor to be so received." Therefore a candidate for whom no poll appeared, nor mentioned in the vestry book, is not duly elected (*Anthony* v. *Seger*, 1 *Hagg. Rep.* 9.); but the court will not interfere except in dubious cases. *Id.* p. 13.

(*g*) [*Evelin*'s case,] *Cro. Car.* 551. [Dr. *King*'s case,] 1 *Keb.* 517. [*The King* v. *Dr. Harris*,] 3 *Bur.* 1420. Vid. *post*, 6. When two sets of churchwardens are sworn in, the right is to be settled in an action, [and not by suit in ecclesiastical court. *Williams* v. *Vaughan*, 1 *Bla. Rep.* 28.] A *quo warranto* will not be granted, as the office does not concern the rights, or prerogatives of the crown, [*The King* v. *Daubeny*,] 2 *Str.* 1196. [*The King* v. *Shepherd*,] 4 *T. Rep.* 381.

where the parson had nomination of a churchwarden before the making of the canon. *God.* 162.

T. 7 *Car.* A prohibition was granted against the churchwarden chosen by the parson of *St. Magnus*, nigh London Bridge, by force of the canon; upon a surmise that the parish hath a custom to chuse both churchwardens. 2 *Roll's Abr.* 287.

And, by *Holt* chief justice, in London, generally, both the churchwardens are appointed by the parish. [*The King* v. *Martin Rice*,] *L. Raym.* 138.

E. 17 *Ja.* *Warner's* case. Warner, one of the churchwardens of All-Hallows, in London, prayed a prohibition; for that, whereas by the custom of the said parish, the parishioners used every year to elect one of the parish, who had borne the office of scavenger, sidesman, or constable, to be churchwarden; and that every year one who had been so elected churchwarden, was to continue a year longer, and to be the upper churchwarden, and another was to be chosen to him, who is called the under churchwarden, that such a choice being made in that parish of the said Warner to be churchwarden, the parson notwithstanding that election nominated one Carter to be churchwarden, and procured him to be sworn in the ecclesiastical court, and denied the said Warner to be churchwarden according to the election of the parishioners; and this by colour of the late canon, that the parson should have the election of one of the churchwardens: and this being against the custom, a prohibition was prayed, and a precedent shown in the common bench, *E.* 5 *Ja.* for the parishioners of *Walbrook*, in London, where such a prohibition was granted: for it being a special custom, the canons cannot alter it, especially in London, where the parson and churchwardens are a corporation to purchase and demise their lands; and if every parson might have election of one churchwarden, without the assent of the parishioners, they might be much prejudiced thereby. *Cro. Ja.* 532.

But although the greatest part of the parishes in London chuse both the churchwardens by custom; yet in all the new erected parishes the canon shall take place, (unless the act of parliament, in virtue of which any church was erected, shall have specially provided that the parishioners shall chuse both); inasmuch as no *custom* can be pleaded in such new parishes. *Gibs.* 215.

H. 5 *G.* *Catten* and *Berwick.* At a court of delegates. The custom was, for the parson to appoint one, and the two old churchwardens the other: but it went no further. In this case the two churchwardens could not agree, so the one presents Berwick, and the parishioners at large chuse Catten. It was in-
[403] sisted for Berwick, that his case was like that of coparceners, where, if they disagree, the ordinary may admit the presentee of which he will, except the eldest alone presents. On the other

side it was said, that the cases widely differed; for in the case of a presentation the ordinary hath a power to refuse, but he hath not so in the case of churchwardens, for they are a corporation at common law, and more temporal than spiritual officers. (9) And a case was cited to have been adjudged in the king's bench, where to a mandamus to swear in a churchwarden, the ordinary returned that he was a very unfit person; but a peremptory mandamus was granted, because the ordinary was not a judge in that case. And the court held, that by this disagreement the custom was laid out of the case; and then they must resort to the canon; under which, Catten being duly elected, they decreed for him, with 60*l.* costs. *Str.* 145.

In some places, the lord of the manor prescribeth for the appointment of churchwardens: and this shall not be tried in the ecclesiastical court, although it be a prescription of what appertains to a spiritual thing. *God.* 153. (1)

E. 3 *G. Stutter* and *Freston.* In the common pleas: Prohibition was granted to the spiritual court, where it was libelled against the defendant, for not appearing to take upon him the office of churchwarden, though thereunto *appointed by the ordinary.* And it was held, that although the parishioners and parson neglect for ever so long to chuse churchwardens, yet the ordinary hath no jurisdiction; for churchwardens were a corporation at common law, and they are different from questmen, who were the creatures of the reformation, and came in by the canon law. The canons say, that churchwardens shall be chosen by the parson and parishioners; and if they disagree, then one by the parson and the other by the parishioners: and otherwise they shall not be. By the court: The proper way is to take a mandamus out of the king's bench. *Str.* 52. (*h*)

4. Any person elected to be churchwarden, and refusing to take the oath according to law, may be excommunicated for such refusal; and no prohibition will lie. *Gibs.* 216. Refusing to act.

M. 3 *G. Casle* and *Richardson.* Libel in the ecclesiastical

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(9) Churchwardens are lay persons, though ecclesiastical officers. Per *Hale, Hardr.* 379. Vid. 2 *Roll.* 71. 1 *Salk.* 166. 5 *Mod.* 326. *King* v. *Rees, Raym.* 246. *Carthew,* 393.

(1) *Williams* v. *Vaughan,* 1 *Bla. Rep.* 28. Mandamus to churchwardens to call a yestry to elect churchwardens refused. *Anon.* 2 *Stra.* 186.

(*h*) [If the bishop or ecclesiastical court make order that a select vestry shall chuse, this does not exclude the other parishioners, if they will be present at the vestry: and if churchwardens are incorporated to be chosen by the parishioners, they ought to be chosen by all of them assembled. *St. Saviour's in Southwark* case, *Lane's Rep.* 21.] If there be a custom to conclude a poll for the election of churchwardens at a certain time, that being a reasonable time, the voters must tender their votes within it. *Rex* v. *The Commissary of the Bishop of Winchester,* 7 *East's Rep.* 573.

court, for not taking upon him the office of chapel-warden. The defendant pleads, that it is a donative; and thereupon moved for a prohibition. And upon debate, the same was denied; the
[404] whole court being of opinion, that though there was a difference as to the incumbent, yet as to the parish officers there was none; for they are the officers of the parish, and not of the patron of the donative. *Str.* 715.

Oath. 5. *Boniface.* We do decree: that laymen, when inquiry shall be made by the prelates and judges ecclesiastical, for correcting the sins and excesses of such as are within their jurisdiction, shall be compelled (if need be) by sentence of excommunication, to take an oath to speak the truth. *Lind.* 109. (1 *a*)

That ordinaries were empowered by the laws of the church, to require an oath of the *testes synodales*, appears, not only from this constitution, but also from the body of the canon law. And the same practice of administering an oath appears in the ecclesiastical records of our own church, where it is often entered, that the presenters were charged upon their consciences to discover whatever they knew to want amendment in things and persons: and in process of time, articles of inquiry were delivered to them, upon which to ground their presentments. *Gibs.* 960.

But as contests grew between the two jurisdictions, ecclesiastical and temporal, this was charged upon the ordinaries and other ecclesiastical judges as an incroachment, that they inserted divers things in their articles of visitation, which were not of spiritual cognizance; and that by requiring an oath from the churchwardens to present according to those articles, they did in consequence require them to take an oath, which by law they could not and ought not to perform. Upon this foundation, prohibitions were applied for and obtained for removing those matters from the spiritual to the temporal courts. Until, at length, the contests of this kind multiplying, and causing great and frequent troubles, both to the spiritual and temporal courts, an oath of a more general form was agreed on by the civilians and common lawyers, by which the churchwardens bound themselves, instead of presenting such things as were contained in the book of articles, to present such things as to their knowledge were presentable by the laws ecclesiastical of this realm. *Gibs.* 960.

"Which oath of the churchwardens is this: "You shall swear "truly and faithfully to execute the office of a churchwarden "within your parish, and according to the best of your skill and "knowledge present such things and persons, as to your know-"ledge are presentable by the laws ecclesiastical of this realm: "So help you God, and the contents of this book." *Gibs.* 216. (2)

(1 *a*) A churchwarden, duly elected by his parish, may be directed by the spiritual court to take the oath of office before the proper ordinary. *Cooper* v. *Allnut*, 3 *Phill. R.* 166.

(2) *Hardres Rep.* 364. No fee can be demanded for swearing them or taking their presentments. *Goslin* v. *Ellison*, 1 *Salk.* 330.

And the sidesman's oath, agreed upon in like manner by the civilians and common lawyers, is as follows: "You shall swear, "that you will be assistant to the churchwardens, in the execu-"tion of their office, so far as by law you are bound: So help "you God." *Gibs.* 216.

Which said oath of the churchwardens, being thus modelled, was allowed and confirmed two several times in the court of king's bench; once in the 25th, and again in the 29th of king Charles the second: before both which judgments, it had been expressly declared in the same court, that though some things might be inserted in the articles of visitation, which were not properly of ecclesiastical cognizance; yet if the oath was conceived and tendered in those general terms, the churchwardens could not legally refuse it: inasmuch as the articles were offered only by way of direction and charge; and by the tenor of the oath, the ecclesiastical laws, and not the articles, were now become the legal rule and measure of their duty. *Gibs.* 961. (*i*)

6. If the party elected offer himself, and the ecclesiastical judge refuse to tender the oath to him, a mandamus from the temporal court will be granted. *Gibs.* 216. Refusing to administer the oath.

H. 8 & 9 *W. K.* and *Martin Rice.* A mandamus was directed to the archdeacon of St. Asaph, to swear and admit a person duly elected by the parish, according to the custom, to be churchwarden. To which it was returned, that he was a person unfit, being a poor dairyman, and the like. And the question was, whether the archdeacon can refuse to swear and admit the churchwarden so elected, for any cause whatsoever. And it was resolved, that he hath no such power: for the churchwarden is an officer of the parish; and his misbehaviour will prejudice them, and not the archdeacon: for he hath not only the custody, but also the property of the goods belonging to the church, and may maintain actions for them; and for that reason it is an office merely temporal, and the archdeacon is only a ministerial officer. And therefore a peremptory mandamus was granted. *L. Raym.* 131. [1 *Salk.* 166. 5 *Mod.* 326. S. C.]

Which same case, as it seemeth, is reported by *Salkeld* under the name of *Morgan* and the archdeacon of *Cardigan*, as followeth: Mandamus to the archdeacon, to swear a churchwarden, being duly elected. The archdeacon made this return, that he was a poor dairyman, and a servant, and unable and unfit to execute the office. And thereupon a peremptory mandamus was awarded; [406]
for the churchwarden is a temporal officer; he hath the property

(*i*) [*Rex* v. *Pratt,*] 3 *Keb.* 206. [*Anon.*] 1 *Ventr.* 127. [By 13 & 14 *W. & M. c.* 6. § 14. and 1 *G.* 1, *st.* 2. *c.* 13. § 20. Churchwardens are exempted from taking the oaths of allegiance, supremacy, abjuration, &c. on entering their offices.

and custody of the parish goods; and as it is at the peril of the parishioners, so they may chuse and trust whom they think fit; and the archdeacon hath no power to elect, or control their election. 1 *Salk.* 166.

M. 11 *G. K.* and *Simpson.* Mandamus to the archdeacon of Colchester, to swear Rodney Fane into the office of churchwarden. He returns, that before the coming of the writ, he received an inhibition from the bishop of London, with a signification that he had taken upon himself to act in the premises. But by the court, The return is ill. It doth not appear, that the town of Colchester is within the diocese of the bishop who inhibits; besides, the archdeacon is but a ministerial officer, and is obliged to do the act, whether it be of any validity or not. And a peremptory mandamus was granted. *Str.* 610. (3)

M. 11 *G. K.* and *White.* To a mandamus directed to the archdeacon to swear a churchwarden; he returned, that he was not elected. Upon opening which Mr. Justice *Fortescue* said, that it was settled, and had been often ruled, that the archdeacon could not judge of the election; and therefore this return was ill: whereupon a peremptory mandamus was granted. But note, (saith lord *Raymond,*) it was certainly wrong; for the return was a good return, and hath often been made to such mandamus, and actions brought upon the return and tried. *L. Raym.* 1379.

T. 11 *G. K.* and *Harwood.* To a mandamus directed to the defendant Dr. Harwood, as commissary of the dean and chapter of St. Paul's, commanding him to swear William Folbigg one of the churchwardens of the parish of St. Giles, Cripplegate, London; the defendant returned, that he was not elected. And it was insisted on the behalf of Folbigg, that the return was ill; that the archdeacon, who was only to obey the writ, could not judge of election: and therefore, upon such a return to such a writ, a peremptory mandamus was granted last Michaelmas term, in the case of *The King* against *White.* That the archdeacon could not judge of the *qualities* of a person chosen by the parish, was cited *H.* 8 *W. K.* and *Rice.* But *Raymond* chief justice, and *Reynolds* justice, held the return to be good. But upon the importunity of the counsel for Folbigg, and pressing the authority of that case of *The King* against *White*, and no counsel for the de-
[407] fendant appearing, a rule was made for a peremptory mandamus unless cause shewed. And at another day, the counsel for the defendant coming to shew cause against the rule, it was discharged. But the court not being unanimous, it was ordered to come on again in the paper. But lord *Raymond* (who reporteth this case) saith, he never heard that it was stirred again.

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(3) 2 *Raym.* 1379. S.C.

But there can be no doubt (he says) but such return is good. *L. Raym.* 1405.

And the proper distinction, as to this point, seemeth to be taken in the case of *Q.* and *Twitty, M.* 1 *An.* Mandamus to swear a churchwarden, suggesting that he was *duly elected.* The return was, that he was *not duly elected.* It was objected, that this was not a good return. But by *Holt* chief justice: Where the writ is to swear one *duly elected,* there a return that he was *not duly elected,* is a good return, for it is an answer to the writ; but where it is to swear one *chosen* churchwarden, there a return that he is not *duly* chosen is naught, because it is out of the writ, and evasive. 2 *Salk.* 433.

H. 19 *G.* 2. *Hubbard* and sir *Henry Penrice.* To a mandamus to swear the plaintiff churchwarden of Heston in Middlesex, the defendant returned, that he was not duly elected. And in the course of the trial, the question was, where the common right of chusing churchwardens rests. The plaintiff insisted, it was in the parishioners at large as to both the churchwardens, and would therefore have left it upon the defendant to shew a custom or right in the parson to name one. The defendant on the contrary insisted, that of common right it was in the parson and parishioners, and therefore it lay upon the plaintiff to prove a custom in the parishioners to chuse both. And of this opinion was *Lee* chief justice, and that though there are some dictums to the contrary, yet they had never been regarded. The plaintiff therefore went on to prove a custom to chuse both by the parishioners, but failed in it; it appearing that though the parson had generally left it to the parishioners, yet he had sometimes interfered. *Lee* chief justice likewise held, that a curate stood in the place of the parson, for the purpose of nominating one churchwarden. *Str.* 1216.

T. 3 *G.* 3. *K.* and Dr. *Harris.* A mandamus was directed to Dr. Harris, commissary of the consistorial and episcopal court of the bishop of Winchester for the parts of Surrey, to admit and swear Henry Griffith and Thomas Garner churchwardens of the parish of St. Olave Southwark. And a like mandamus was also directed to him to admit and swear another set of church- [408] wardens into the same office. Dr. Harris returns, that a cause was depending before him, in which it was disputed, which of the two sets of churchwardens had been duly elected; and till that is determined, he cannot admit either one set or the other. By lord *Mansfield* and the court: The return is bad; the commissary cannot try the right. He ought to obey both writs, and it is of no prejudice to either party. It was proposed by the court, and consented to by the parties, to try the right on a feigned issue; and the execution of the peremptory mandamus to be suspended till after the trial, and then the peremptory

mandamus to go to swear in those that shall prevail upon the trial. *Bur. Mansf.* 1420. [1 *Bla. Rep.* 430.]

Churchwardens a corporation. 7. The churchwardens are so far incorporated by law, as to sue for the goods of the church, and to bring an action of trespass for them, and also to purchase goods for the use of the parish; but they are not a corporation in such sort as to purchase lands, or to take by grant (4), except in London, where they are a corporation for those purposes also. *Gibs.* 215. (*k*)

And therefore, if any one give land to the parish for the use of the church, it must not be to the churchwardens and their successors, but it should be to feoffees in trust to the use intended; which must from time to time be renewed, as the trustees die away. *Gibs.* 215. (5)

And although the churchwardens may have their action for the goods of the parish, yet they cannot dispose of them without the consent of the parish; and a gift of such goods by them, without the consent of the sidesmen or vestry, is void. *Wats.* *c.* 39. 1 *Roll's Abr.* 393. (6)

Upon the like foundation, where an obligation is made to them and their successors, and they die, their executors shall have action, and not their successors. *Vin.* tit. *Churchwardens*, D.

Presentments. 8. The persons who are to make presentments are now chiefly the churchwardens; which is not according to the rule of the ancient canon law, nor according to the practice of the church of England before the reformation; churchwardens being by their [409] original office only to take care of the goods, repairs, and ornaments of the church: for which purposes and no other, they have been reputed a body corporate for many hundred years; but the business of presenting was devolved upon them, by canons and constitutions of a more modern date. *Gibs. on Visitat.* 59.

The ancient method was, not only for the clergy, but the body of the people within such a district, to appear at synods, or (as we now call them) general visitations; (for what we now

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(4) 12 *H.* 7. 29 *a.* 1 *Rol.* 393. *l.* 10.

(*k*) See Church, VIII. 3. & 24., and [*Warner*'s case,] *Cro. Jac.* 532. [*Jones*, 439.] But by 9 *G.* 1. *c.* 7., the churchwardens, with consent of the major part of the parishioners or inhabitants in vestry, may purchase houses to lodge and employ the poor in.

(5) Churchwardens cannot make a lease of lands given to feoffees for the use of the parishioners (12 *H.* 7. 29 *a.* 13 *H.* 7. 10 *a.*), nor maintain trespass or other action for entry or taking the profits of such land. 12 *H.* 7. 29 *a.*

(6) One churchwarden cannot singly dispose of the goods of the parish (*Starky* v. *Berton*, *Cro. Jac.* 234.), nor both churchwardens together; for they can do nothing to the disadvantage of the church. 13 *H.* 7. 10. *a.* *Yelv.* 173. 1 *Rol.* 393. *l.* 20. and 426. Yet they may dispose of them with consent of the parish. 1 *Rol.* 393. *l.* 26.

call visitations were really the annual synods, the laws of the church by *visitations* always meaning visitations parochial;) and the way was, to select a certain number, at the discretion of the ordinary, to give information upon oath concerning the manners of the people within the district; which persons the rule of the canon law upon this head supposes to have been selected while the synod was sitting: but afterwards, when the body of the people began to be excused from attendance, it was directed in the citation, that four, six, or eight, according to the proportion of the district, should appear, together with the clergy, to represent the rest, and to be the *testes synodales*, as the canon law elsewhere styles them. But all this while, we find nothing of churchwardens presenting, till a little before the reformation; when we find the churchwardens began to present, either by themselves, or with two, three, or more creditable parishioners joined with them: and this (as was before observed) seemeth evidently to be the original of that office which our canons call the office of sidemen or assistants. *Id.* 59, 60, 61. (*l*)

(*l*) As the churchwardens may present in the temporal, so also they may libel in the spiritual courts. 2 *W. & M.* Newton, one of churchwardens of St. Botolph's, London, libelled against Quiltes for stopping the church door and windows by sheds, &c. built, as he supposed, upon part of the churchyard. Upon which a prohibition was prayed, and the suggestion was, that they were not built upon any part of the churchyard, but upon a lay fee. But the court agreed, that no prohibition should be granted to any suit in the spiritual court, for any nuisance or other matter done in the churchyard, upon a suggestion that the churchyard is a lay fee; for a nuisance there is properly of ecclesiastical conusance. *Carth.* p. 151. See Church, 3, 4, 5.

Their duty and power in general.

[Churchwardens, for neglect of duty, may be sued in the ecclesiastical court; as if they take the bells out of the church. *Welcome* v. *Lake*, 1 *Sid. Rep.* 281, 282. So an indictment lies if they take money, &c. *corrupté colore officii*, and do not account for it. *The King* v. *Eyres*, 1 *Sid. Rep.* 307. They may be removed for misbehaviour, and others chosen before the year expires. *Lamb. Off. Ch. Sect.* 3. By stat. 1 *El. c.* 2. they are to levy 12*d.* forfeited for not resorting to the parish church, &c. to the use of the poor, by distress on the goods or lands of the party. They are empowered to keep all persons orderly at church: thus they may take off the hat of any who wears it in church at the time of divine service, without prosecution in the spiritual court. *Courtny* v. *Philps*, 1 *Lev.* 196. 1 *Sid.* 196. *Hawe* v. *Planner*, 1 *Saund. Rep.* 14. 2 *Keb.* 124. 1 *Sid.* 301. S. C. 1 *Hawk.* 139. 1 *Hagg. Rep.* 174. *Glover* v. *Hind*, 1 *Mod.* 168. But they have no power to interfere in the service of the church, with which they have nothing to do, except to collect the alms at the offertory; and they may refuse to admit strange preachers into the pulpit till their letters of orders are produced. *Can.* 50. 1603. Thus they cannot prohibit chaunting psalms, &c.: and if the minister introduces irregu-

Removing them.

Their duty as overseers of the poor.

[410]

9. Every churchwarden is also an *overseer of the poor*, by the statute of the 43 *El.* c. 2., and as such is joined with the overseers appointed by the justices of the peace, in all matters relating to the poor: and indeed the churchwardens were the original overseers long before there were any others specially appointed by act of parliament. (*m*)

One churchwarden cannot release.

10. The release of one churchwarden is in no case a bar to the action of the other; for what they have is to the use of the parish.

T. 7 *Ja. Starkey* and *Berton.* In prohibition: The case was; two churchwardens sue in the spiritual court for a levy towards the reparation of their church, and had a sentence to recover, and costs assessed: the one releaseth, and the other sues for the costs, and there this release was pleaded and disallowed. Whereupon he prays a prohibition; and all this matter was disclosed in the prohibition; and the defendant thereupon demurred in law. And now it was moved, that this release by the one, being in the personality, should discharge the intire. But it was resolved by all the court to the contrary; for churchwardens have nothing but to the use of their parish, and therefore the corporation consists in the churchwardens; and the one solely cannot release nor give away the goods of a church; and the costs are in the same nature, which the one without the other cannot discharge. And of that opinion was all the court of king's bench. Wherefore it was adjudged for the defendant. *Cro. Ja.* 234. (7)

How long they shall continue in office.

11. By *Can.* 89. The churchwardens or questmen shall not continue any longer than one year in that office; except perhaps they be chosen again in like manner.

For although in some places there is but one new churchwarden yearly elected, (he who was junior churchwarden before

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larity into the service, they must complain to the ordinary. 1 *Hagg. Rep.* 173, 174. See tit. Public Worship. If goods are given to a parish or church, the churchwardens may take them; for they are a corporation *quoad istuc* (12 *H.* 7. 29. *a.*), and the successors may have account for them against their predecessors. 8 *Ed.* 4. 6. *b. Tatlour and another* v. *Parner*, 1 *Ventr.* 89. So if goods are put into the church to be there used, for that is a gift. *Lamb. Off. Ch.* § 2. Neither one only (*Starkey* v. *Berton, Cro. Jac.* 234.), nor both together, can dispose of the church goods (13 *H.* 7. 10. *a. Yelv.* 173. 1 *Rol.* 393. *l.* 20. 1 *Rol.* 426.); yet disposition thereof with consent of the parish is good (1 *Rol.* 393. *l.* 26.); or sending a bell, with consent, to be cast, is a discharge on account, though no bar to an action. *Tatlour and another* v. *Parner*, 1 *Ventr.* 89.]

(*m*) For the appointment, powers, and duties of *overseers*, see *Bott's Poor Laws*, by *Const. ch.* 1. &c. and *Burn's Justice*, [*by Chetwynd*,] tit. Poor.

(7) *Yelv. Rep.* 173.

being continued of course), yet of that case the books of common law, as well as the canon, suppose a new election to be made of both. *Gibs.* 215. (*n*)

But by *Can.* 118. The office of all churchwardens and sidesmen shall be reputed to continue until the new churchwardens that shall succeed them be sworn.

And although a parish prescribe to chuse two churchwardens, and that the person so chosen shall continue in that office for two years; yet the parish may, notwithstanding the prescription, remove such churchwardens at their pleasure, and chuse new ones.: for, as it is said, the parish might suffer great loss, if the churchwardens should continue so long in their office contrary to their will; for in that time they might waste all the parish goods belonging to the church. *Wats. c.* 39. (*o*) [411]

12. *Can.* 89. All churchwardens at the end of their year, or within a month after at the most, shall, before the minister and the parishioners, give up *a just account* of such money as they have received, and also what particularly they have bestowed in reparations and otherwise for the use of the church. And last of all, going out of their office, they shall truly deliver up to the parishioners whatsoever money or other things of right belonging to the church or parish, which remaineth in their hands; that it may be delivered over by them to the next churchwardens, *by bill indented.* (*p*) Account.

(*n*) *Warner*'s case, *Cro. Jac.* 532. *Noy.* 31.

(*o*) 13 *Rep.* 70.

(*p*) All churchwardens being also overseers of the poor (*ante*, 9.), it will be proper to notice here the 17 *G.* 2. *c.* 38., which regulates the mode of their accounting, and enacts, that "the churchwardens and overseers of the poor shall yearly and every year, within fourteen days after other overseers shall be nominated and appointed to succeed them, deliver in to such succeeding overseers a just, true, and perfect account in writing, fairly entered in a book or books to be kept for that purpose, and signed by the said churchwardens and overseers, of all sums of money by them received, or rated and assessed, and not received; and also of all goods, chattels, stock, and materials that shall be in their hands, or in the hands of any of the poor in order to be wrought, and of all monies paid by such churchwardens and overseers so accounting, and of all other things concerning their said office; and shall also pay and deliver over all sums of money, goods, chattels, and other things, as shall be in their hands, unto such succeeding overseers of the poor; which said account shall be verified by oath, or by the affirmation of persons called *quakers*, before one or more of his majesty's justices of the peace, which said oath or affirmation such justice or justices is and are authorized and required to administer, and to sign and attest the caption of the same at the foot of the said account, without fee or reward; and the said book or books shall be carefully preserved by the church-

A just account] If the custom of the parish is, for a certain number of persons to have the government thereof, and the account is given up to them, the custom is good in law, and the account given to them is a good account. *Gibs.* 216.

By bill indented] *Lindwood*, speaking of the inventory of the goods of the church, to be delivered in writing to the archdeacon, says, "it were good that these writings should be in-"dented, so that one part might remain with the archdeacon, "and the other with the parishioners;" from whence this branch of the present canon seemeth to have been taken. *Gibs.* 216. (*q*)

M. 3 *W. Styrrop* and *Stoakes*. If money be disbursed by churchwardens for repairing the church, or any thing else merely ecclesiastical, the spiritual courts shall allow their accounts: but if there be any thing else that is an agreement between the parishioners, the succeeding churchwardens may have an action

wardens and overseers, or one of them, in some public or other place in every parish, town, or place; and they shall and are hereby required to permit any person there assessed, or liable to be assessed, to inspect the same at all seasonable times, paying sixpence for such inspection, and shall upon demand forthwith give copies of the same, or any part thereof, to such person, paying at the rate of sixpence for every three hundred words."

And in default of yielding up an account, and delivering over money or goods, &c. in their hands as aforesaid, they may be committed to the common gaol, by two or more justices of the peace, until they shall have given such account, and yielded up such money, goods, &c.

The 43 *Eliz. c.* 2. § 2. had before directed an account to be given in by the overseers within four days after the end of their year.

[By 1 *G.* 4. *c.* 94. § 9. The population accounts shall be preserved by the churchwardens, and delivered over to their successors.

As to contracts by the churchwardens and overseers for lodging or employing of the poor, see 45 *G.* 3. *c.* 54. § 1, 2.

Where a churchwarden, a farmer, supplied corn and flour to the poor of his parish, he was held liable to the penalties inflicted by 55 *G.* 3. *c.* 137. § 6., though he supplied them as another individual would, and at the fair market prices. *Pope* v. *Backhouse*, 2 *Moore's Rep.* 186. Again, when the defendant, a guardian of the poor, sold sheep to a party who had the contract for providing for the poor, it was held that it was a case within the words and spirit of the above act. *West* v. *Andrews*, 5 *B. & A.* 328. 1 *B. & Cres. R.* 77. S. C. This act only prohibits churchwardens or overseers from supplying the workhouse or poor of the parish generally; and therefore, where an overseer receiving an order for the relief of J. S., an individual pauper, paid J. S. part in money, and, by the consent of J. S., gave her the remainder in goods from his shop, he was held not liable to the penalty of 100*l.* imposed by the act. *Proctor* v. *Mainwaring*, 3 *B. & A.* 145.]

(*q*) *Lind.* 50.

of account at law, and the spiritual court in such case hath not jurisdiction. 12 *Mod.* 9. (8)

13. If a churchwarden in any case is maliciously sued in the spiritual court for not making up his account, and is excommunicated, when in fact it hath been duly made, he may have a prohibition: and also an action upon the case will lie. *Gibs.* 216. *Bunb.* 247. 2 *Rol.* 71. Account, when settled, final.

M. 4 *G.* 2. *Snowden* and *Herring.* Where churchwardens have passed their accounts at a vestry, the spiritual court shall not afterwards proceed against them to account upon oath. *Bunb.* 289.

E. 7 *G.* 2. *Wainwright* and *Bagshaw.* The churchwardens were cited in to the court of Litchfield to account: they pleaded, that they had accounted at the vestry, according to law; which [413] was rejected: and a prohibition was granted. For the ordinary is not to take the account; he can only give a judgment that they do account; and to what purpose should they be sent back to those who have taken their account already? *Str.* 974.

T. 13 *G.* 2. *Adams* and *Rush.* By the court: The spiritual court hath no jurisdiction to settle the churchwardens' accounts. And a prohibition was granted, after sentence allowing the accounts, and an appeal to the arches. *Str.* 1133. (*r*)

And if the churchwardens have laid out the parish money imprudently and improvidently; yet, if it be truly and honestly laid out, they must be reimbursed again: and the parishioners can have no remedy herein, unless some fraud or deceit be proved against them: because the parish have made them their trustees. But if they be going on in an expensive way, the parishioners may complain to the ordinary, in order to give a check to them, or to procure (Dr. *Gibson* says) a removal of them from their office. *Gibs.* 196. (*s*)

14 *M.* 3 *G.* 2. *Dent* against *Prudence* and *Bond.* Before the delegates. Adjudged that the churchwardens Prudence and Bond could not cite the defendant Dent into the spiritual court, for Cannot bring actions after their office is expired. (9)

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(8) 4 *Vin. Ab.* 530. Churchwardens *de facto*, though not *de jure*, may maintain an action against their predecessor for money received by him for the use of the parish. *Turner* v. *Baynes*, 2 *Hen. Bla.* 559. And this whether the plaintiffs are his immediate successors or not. *Ibid.*

(*r*) The spiritual court may compel the churchwardens to deliver in their account, but cannot decide on the propriety of the charges. Therefore, if they take any step after the accounts are delivered in, it is an excess of jurisdiction for which a prohibition will be granted, even after sentence. *Leman* v. *Goulty*, 3 *T. Rep.* 3.

(*s*) *Ante*, 11.

(9) Churchwardens are taken, in favour of the church, to be for some purposes a kind of corporation at the common law. Thus they

non-payment of his church-rate, after their year was expired; for they can only sue in their politic capacity, and cannot institute any suit after that capacity is gone. It was agreed, that if the suit had been begun with their year, they might have proceeded in it after their year was out, this being of necessity to prevent people from delays in order to wear out the year; but in regard this suit was not commenced till the year was out, and no precedents were shewn to warrant this suit, the defendant Dent was dismissed. *Str.* 852. 1 *Bac. Abr.* 376. (*t*)

But their successors must do it.

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15. If the churchwardens for the time being neglect to bring an action for any of the goods of the church taken away, their successors may bring trespass for them, in respect of their office: but then the new churchwardens must say, to the damage *of the parishioners*, and not of *themselves*: though the old churchwardens, in whose time the goods were taken away, might say either. *Wats. c.* 39. (*u*)

And if any of the goods of the church are detained, or not delivered by the predecessor, the successor hath an action against him also. *Gibs.* 216.

Yet they may be relieved in equity.

16. *E.* 13 *An. Nicholson* and *Masters*. On a bill in chancery against ninety parishioners, by the executrix of one of the churchwardens of Woodford, to be reimbursed money laid out by

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may maintain trespass or other possessory action against any who wrongfully take the bells, books, or other goods of the church; for though the property is in the purchaser, the custody and possession belong to them. 11 *H.* 4. 12. *a.* *Bucksale* v. ——, 1 *Roll.* 57. And

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this though another parishioner, or the vicar himself, takes them. 11 *H.* 4. 12. *a.* And the declaration may state possession by plaintiffs of the goods of the parishioners. *Tatlour and another* v. *Parner*, 1 *Ventr. Rep.* 89. And if at suit of the churchwardens, in whose time the goods were taken, may conclude *ad damnum ipsorum* or *parochianorum*. *Hadman and another* v. *Ringwood*, *Cro. El.* 179. 8 *Ed.* 4. 6. *b.* *Dal.* 105. Suit for such goods by the parson in the spiritual court shall be prohibited. 1 *Roll.* 57. Churchwardens may have an appeal of robbery for such goods stolen, &c. 12 *H.* 7. 27. *b.* Successors in the office shall maintain trespass, &c. for goods taken in the time of their predecessors. 12 *H.* 7. 28. *a.* *Hadman and another* v. *Ringwood*, *Cro. El.* 145. 179. 1 *Leo.* 177. *Dal.* 105. *dub.* laying the trespass *ad damnum parochianorum*. *Cro. El.* 179. 4 *Vin. Ab.* 525. Churchwardens may have an action against any one who defaces a monument, &c. (*Godb.* 279.), but cannot maintain trespass or other action for entry or taking the profits of lands given to the use of the parish (12 *H.* 7. 29. *a.* See *ante*, p. 408. (4.),) nor sue at law for a legacy or a thing never in their possession. *Com. Dig.* tit. *Esglise*, (F 3.)

(*t*) See Church, IX. *in fine.*

(*u*) [*Hadman and another* v. *Ringwood*,] *Cro. Eliz.* 145. 179. [S. C. No suit shall be against them by their successors for a thing done *ratione officii*. *Godb.* 279. *Aliter*, for breach of duty. 1 *Sid.* 282.]

the testator as churchwarden, for rebuilding the steeple of the church, it was objected that this matter was proper for the ecclesiastical court, and not for this court. But by *Harcourt*, chancellor, the plaintiff is proper for relief in this court, and there are many precedents of the like nature. And it was decreed, that the parishioners should reimburse the plaintiff the money laid out by her testator, with costs of this suit; and that the money should be raised by a parish rate. *Vin.* tit. *Churchwardens*, C.

T. 1718. Radnor parish in Wales. The churchwardens, as being a corporation for the goods of the parish, commenced a suit with the consent and by order of the parish, concerning a charity for the poor: in which suit they miscarried. And then they brought a bill against the subsequent churchwardens, to be repaid the costs by them expended; and had a decree for it. It was proved, that from time to time the parish was made acquainted with what they did; and though there was no vestry by prescription, yet a vestry book, kept for the parish acts, was allowed as evidence of their consent. They are the trustees of the parish; and the parishioners ought to contribute, and not lay the burden upon these poor people the churchwardens. And the annual successive churchwardens need not to be made parties, as they are renewed. By the master of the rolls. *Vin.* tit. *Churchwardens*, C.

But it is said, the spiritual court hath no power to order a rate to reimburse the preceding churchwardens; and a prohibition was granted after sentence, in the case of *Dawson* and *Wilkinson*, *T.* 10 & 11 *G.* 2., because upon the face of the order it appeared the ecclesiastical court had no jurisdiction: And by the whole court of king's bench unanimously, There cannot be a rate made to reimburse the churchwardens; because they are not obliged to lay any money out of their own pockets. *Cases in the time of Lord Hardwicke*, 381. (*x*) [415]

17. If an action be brought against any churchwardens, or persons called sworn men, executing the office of churchwarden, for any thing done by virtue of their office; they may plead the general issue, and give the special matter in evidence: and if a verdict is given for them, or the plantiff shall be nonsuit, or discontinue, they shall have double costs. 7 *J. c.* 5. 21 *J. c.* 12. (1)

Their protection by the law in the due execution of their office.

(*x*) *French* v. *Dear*. On a bill by a former churchwarden against the parish officers, trustees of an estate for the poor of the parish, and forty inhabitants, to be reimbursed money laid out on account of the trust under an order of vestry, his accounts being passed, and an order made for payment, the *lord chancellor* expressed a strong opinion against such a bill, but it was dismissed on the ground of informality. 5 *Ves.* 547. [This point was expressly decided against the churchwarden in *Lanchester* v. *Thompson and others*, 5 *Madd. R.* 4. And see 378. *note.*]

(1) So a churchwarden taking a distress for a poor rate under a

M. 8 *Car. Kerchevel* against *Smith* and others. Action upon the case was brought against them; because that they, being churchwardens, presented the plaintiff falsely and maliciously upon a pretended fame of incontinency. Upon not guilty, it was found for the defendants, and moved, that they might have double costs, because they were troubled and vexed for matter which did concern their office. But it was resolved, it was not within the statute: for it is merely ecclesiastical; and the statute was never intended, but where they shall be vexed concerning temporal matters which they do by virtue of their office, and not for presentments concerning matters of fame. *Cro. Car.* 285. (*y*)

Churchyard. See Church.

Cistercians. See Monasteries.

Citation.

Citation, what.

1. A CITATION is a judicial act, whereby the defendant, by authority of the judge (the plaintiff requesting it) is com-

[416] manded to appear, in order to enter into suit, at a certain day, in a place where justice is administered. *Conset.* 26.

Form of a citation.

2. The citation ought to contain, 1. The name of the judge, and his commission, if he be delegated; if he is an ordinary judge, then the style of the court where he is judge. 2. The name of him who is to be cited. 3. An appointed day and place where he must appear; which day ought either to be expressed particularly to be such a day of the week or month, or else only the next court day (or longer) from the date of the citation: and

warrant of magistrates is entitled to the protection of the statute, in having the magistrates joined with him as defendants in an action of trespass. *Harper* v. *Carr*, 7 *T. Rep.* 270. But the statutes 7 *J.* 1. *c.* 5. and 21 *J.* 1. *c.* 12. § 3., giving double costs to parish officers sued, &c. do not extend to actions against them for nonfeasance, such as the nonpayment of money laid out for the support of one of their paupers by another parish into which he went, and for which an action of *assumpsit* was brought against them. *Atkins* v. *Banwell*, 3 *East. Rep.* 92. Nor are they entitled to double costs on judgment as in case of a nonsuit in an action brought against them for the price of goods sold and delivered to them for the use of the poor. *Blanchard* v. *Bramble*, 3 *M.* & *S.* 131.

(*y*) By 9 *G.* 3. *c.* 37. Churchwardens, for paying the poor otherwise than in lawful money, are to forfeit to the poor not less than 10*s.* nor more than 20*s.* And by 27 *G.* 3. *c.* 37. § 23. Churchwardens and overseers, on notice from a justice of the peace, are to prosecute pawnbrokers offending against that act at the expence of the parish.

the time of appearance ought to be more or less, according to the distance of the place where they live. 4. The cause for which the suit is to be commenced. 5. The name of the party at whose instance the citation is obtained. *Conset.* 26.

By *Can.* 120. No bishop, chancellor, archdeacon, official, or other ecclesiastical judge, shall suffer any general processes of *quorum nomina* to be sent out of his court, except the names of all such as thereby are to be cited shall be first expressly entered by the hand of the register or his deputy under the said processes, and the said processes and names be first subscribed by the judge or his deputy, and his seal thereto affixed.

The rule of the ancient canon law in which case was, that by the general clause *Quidam alii* in citations, not more than three or four persons should be drawn into judgment; whose names (*quorum nomina*) the person who obtained the citation was particularly to express, that there might be no room for fraud, in varying the names at pleasure. *Gibs.* 1009.

A company in London refusing to pay a church rate set upon their hall, the master and wardens were cited into the ecclesiastical court by their sirnames and names of baptism, with the addition of m[illegible] and wardens of the company of wax-chandlers. And upon moving for a prohibition, because they were cited in their natural capacity, when it should have been in their politic capacity, the court held the citation to be good, because the body politic could not be cited, and there was no remedy but in this way: and a prohibition was denied. *H.* 33 & 34 *C.* 2. *Skin.* 27.

3. *Otho.* Forasmuch as we are given to understand, that they who have obtained letters citatory do send them by three vile messengers to the place where the person to be cited is said to inhabit; which letters two of them do put up over the altar of the church of that place, or in some other place there, and the third presently taketh them away; from whence it cometh to pass, that two of them afterwards giving their testimony that they cited him according to the manner and custom of the country, he is excommunicated or suspended as contumacious, whereas indeed he was not contumacious, nor knew any thing of the citation: Therefore to take away this most abominable abuse, and other such like, we do ordain, that from henceforth letters citatory in causes ecclesiastical shall not be sent by those who obtain them, nor by their messengers; but the judge shall send them by his own faithful messenger, at the moderate expence of the person suing them out; or at least the citation shall be directed to the dean of the deanery [this is, to the rural dean] where the party to be cited dwelleth, who at the judge's commandment shall faithfully execute the same by himself or his certain and trusty messengers. *Athon.* 63. (By whom to be executed.)

Othob. We do decree, that when the judge sendeth a citation against any person who is absent, he shall commit the execution thereof to the dean of the place, or to some person certain. *Athon.* 123.

Stratford. Whereas bishops and archdeacons, their officials and other ordinaries, and their commissaries, command primary citations for the correction of offenders to be executed by rectors, vicars, or parish priests; and it is frequently laid to their charge, that concerning those matters for which the citation is made they perversely disclose the confessions of the parties cited made privately unto them, whereby they are greatly scandalized, and the parishioners for the future refuse to confess their sins unto them: we do ordain, that primary citations from the said ordinaries shall not be served by the rectors or others aforesaid, but by the officials, deans, apparitors, or other ministers of the said ordinaries. And if any such primary citations shall be committed to the rectors, vicars, or priests; they shall not be bound to obey them, but the same and all subsequent censures and processes thereupon shall be utterly void and of no effect. *Lind.* 90.

In what manner to be executed.

4. By the aforesaid constitution of *Otho*, the person to whom the citation is directed shall diligently seek the party to be cited.

And when he hath found him, he is to shew to the party cited the citation under seal, and by virtue thereof cite him to appear at the time and place appointed: And it is usual also to leave a note with him, expressing the contents thereof. 1 *Ought.* 44, 45.

[418] But if it be returned upon the citation, that the defendant cannot be found, then the plaintiff's proctor petitioneth, that the defendant may be cited personally (if he can), to appear and answer the contents of the former citation; and if not personally, then by any other ways and means, so as the party to be cited may come to the knowledge thereof. And this is that which is called a citation *viis et modis*, or a public citation, seeing it is executed either by public edict, a copy thereof being affixed to the doors of the house where the defendant dwells, or the doors of the parish church where he inhabits, for the space of half an hour in the time of divine service; or by publication in the church in time of divine service; or, as it hath been said, by the tolling of a bell, or the sounding of a trumpet, or the erecting of a banner. This being done, a certificate must be made of the premises, and the citation brought into court; and if the party cited appear not, the plaintiff's proctor accuseth his contumacy, (he being first three times called by the crier of the court,) and in penalty of such his contumacy requesteth that he may be excommunicate. *Const.* 34. 1 *Ought.* 49.

But the citation must be served at the door or outside of a man's house; for the house may not be entered in such case without his consent. *Lind.* 87. *Athon,* 63.

To this purpose, by the aforesaid constitution of *Otho,* it is directed, that if the person to whom the citation is committed shall not be able to find the party, he shall cause the letters to be publicly read and expounded, on the Lord's day, or other solemn day, in the church of that place where he hath usually dwelt, during the celebration of the mass.

Or publicly in the street (saith *Athon*), if he be hindered from entering the church; otherwise he shall read the citation in the church, and leave a copy thereof upon the altar: and the absent person, by other ways, means, and cautions (if any occur), shall be cited, before he be proceeded against as contumacious. *Athon,* 65.

In like manner, by a constitution of archbishop *Mepham,* in certain cases, they who cannot be personally cited shall be cited at their house, if they have any at which they can be safely cited; if they cannot be safely cited at their house, then in the parish church where such house standeth; or if they have no house, then in the cathedral church of the diocese, and also in the church of the parish (1) where the offence was committed (if it can be safely done). And in such cases, they shall be proceeded against in the same manner as if they had been cited personally. *Lind.* 85. [419]

Citing out of the diocese.

5. By the same constitution, it is ordained, that all ordinary judges of the province do readily assist one another in making citations and executions, and in executing all lawful mandates.

Yet by the ancient laws of the church, the metropolitan was forbidden to exercise judicial authority in the diocese of a comprovincial bishop, unless in case of appeal or vacancy. And therefore, when archbishop Peccham excommunicated the bishop of Hereford for resisting this concurrent power, and affirming against the archbishop that he could not exercise any jurisdiction exclusive of the bishop within the bishop's own diocese, nor take cognizance of causes there *per querelam;* the archbishop defended his claim, not upon the common right of a metropolitan, but upon the peculiar privilege of the church of Canterbury, that the church of Canterbury enjoyeth such a privilege, that the archbishop for the time being may and ought to hear causes arising within the dioceses of his suffragans, and that in the first instance. Which privilege probably sprung from the archbishops of Canterbury being *legati nati* to the pope. *Gibs.* 1004.

But now, by the statute of the 23 *Hen.* 8. *c.* 9. intitled "*The*

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(1) Citation may be served by fixing on the church door on Sunday. *Allen* v. *Brookbank,* 2 *Salk.* 625.

bill of citations," where great numbers of the king's subjects, as well men, wives, servants, as other the king's subjects, dwelling in divers dioceses of this realm of England and Wales, have been at many times called by citations and other processes compulsary, to appear in the arches, audience, and other high courts of the archbishops of this realm, *far from and out of the diocese* where they dwell; and many times to answer to surmised and feigned causes, and suits of defamation, withholding of tithes, and such other like causes and matters, which have been sued more for malice and for vexation than for any just cause of suit; and where certificate hath been made by the summoner, apparator, or any such light literate person, that the party against whom any such citation hath been awarded, hath been cited or summoned, and thereupon the same party so certified to be cited or summoned hath not appeared according to the certificate, the same party therefore hath been excommunicated, or at the least suspended from all divine services; and thereupon, before that he or she could be absolved, hath been compelled, not only to pay the fees of the court whereunto he or she was so called by citation or other process, amounting to the sum of 2*s.* or 20*d.* at the least, but also to pay to the summoner, appatator, or other light literate person by whom he or she was
[420] so certified to be summoned, for every mile being distant from the place where he or she then dwelled, unto the same court whereunto he or she was so cited or summoned to appear, 2*d.*: to the great charge and impoverishment of the king's subjects, and to the great occasion of misbehaviour and misliving of wives, women, and servants, and to the great impairment and diminution of their good names and honesties: it is therefore enacted, *that no manner of person shall be from henceforth cited* or summoned, or otherwise called to appear by himself or by any procurator, before any ordinary, archdeacon, commissary, official, or any other judge spiritual *out of the diocese* or *peculiar jurisdiction where he shall be inhabiting* at the time of awarding or going forth of the same citation or summons (except it shall be for any of the causes hereafter written, that is to say, (1) for any spiritual offence or cause committed or omitted by the bishop, archdeacon, commissary, official, or other person having spiritual jurisdiction, or being a spiritual judge, or by any other person within the diocese or other jurisdiction whereunto he shall be cited or otherwise lawfully called to appear and answer; and (2) except also it shall be upon matter or cause of appeal, or for other lawful cause, wherein any party shall find himself grieved or wronged by the ordinary or judge of the diocese or jurisdiction, or by any of his substitutes, officers, or ministers, after the matter or cause there first commenced and begun to be shewed unto the archbishop or bishop, or any other having peculiar

jurisdiction, within whose province the diocese or place peculiar is; or (3) in case that the bishop or other *immediate judge or ordinary dare not nor will not convent the party* to be sued before him; or (4) in case that the bishop of the diocese, or judge of the place, within whose jurisdiction or before whom the suit by this act shall be commenced and prosecuted, *be party* directly or indirectly to the matter or cause of the same suit; or (5) in case that any bishop, or any inferior judge, having under him jurisdiction in his own right and title, or by commission, *make request or instance to the archbishop*, bishop, or other superior ordinary or judge, to take, treat, examine, or determine the matter before him or his substitutes, and that to be done *in cases only where the law civil or canon doth affirm execution of such request or instance of jurisdiction to be lawful or tolerable*); upon pain of forfeiture, to every person by any ordinary, commissary, official or substitute by virtue of his office, or at the suit of any person to be cited or otherwise summoned or called contrary to this act, of double damages and costs, to be recovered by action of debt or upon the case in any of the king's high courts, or in any other competent temporal court of record; and upon pain of forfeiture for every person so summoned, cited, or otherwise called as aforesaid to answer before any spiritual judge out of the diocese or other jurisdiction where the said person dwelleth, 10*l*., half to the king, and half to him that will sue in any of the king's said courts. § 1, 2, 3. [421]

Provided always, that it shall be lawful to every archbishop of this realm to cite any person inhabiting in any bishop's diocese within his province, *for causes of heresy*, if the bishop or other ordinary immediate thereunto consent, or do not his duty in punishment of the same. § 4.

Provided also, that this shall not extend to the prerogative of the archbishop of Canterbury, for calling any person out of the diocese where he inhabiteth, *for probate of any testament*. § 5.

Provided also, that this act shall not be prejudicial to the archbishop of York, for probate of testaments within his province and jurisdiction, by reason of any prerogative. § 7.

Far from and out of the diocese] By reason of this expression in the preamble, it was doubted in the 6 *Ja.* whether the archbishop was not at liberty (notwithstanding this act) to cite the inhabitants of London and other neighbouring places of the same diocese into his court of arches; which would be no more a grievance to the subject than the being cited into the consistory of London, and could not properly be called a citing out of the diocese, since the court of arches is held within the diocese of London. But all the justices of the court of common pleas held, that the archbishop is restrained by this act from citing any in-

habitants of London besides his own peculiars; because the excusing the subject from travel and charges was not the only benefit intended by it, but also the benefit of appeals; and by diocese in this statute, was understood jurisdiction; and as to the language of the preamble, that the enacting parts of statutes are in many cases of larger extent than their preambles are. *Gibs.* 1005.

In the next reign, *H.* 9 *Car.* in *Gobbet's* case, the like point came under consideration again, and prohibition to the arches being prayed, the determination was as follows: Jones said, that he was informed by Dr. Duck, chancellor of London, that there hath been for long time a composition between the bishop of London and the archbishop of Canterbury, that if any suit be begun before the archbishop, it shall always be permitted by the bishop of London; so that it is as it were a general licence, and so not sued there but with the bishop's assent; and for that reason the archbishop never makes any visitation in London
[422] diocese. And hereupon the prohibition was denied. *Gibs.* 1005. (*a*)

But in the case of *Ford* and *Weldon*, *H.* 15 & 16 *C.* 2. when the same composition was urged in the court of king's bench, against a prohibition to the arches, the court was divided: Hide, chief justice, and Windham, against the prohibition; and Twisden and Keyling for it. Against the prohibition it was said, that the arches is within the diocese of London, and that the composition amounts to a licence; and for the prohibition, that London is not within the jurisdiction of the arches, and that the composition is taken away by the statute, inasmuch as no agreement between ordinaries can prejudice the people, for whose benefit the statute was made. *Gibs.* 1005. (*b*)

That no manner of person shall be from henceforth cited] But if a man is cited out of his diocese, and appears, and sentence is given, or if he submits himself to the suit, he shall have no benefit by this statute, nor will a prohibition be granted. *Gibs.* 1006. [*Vanacre* v. *Spleen*,] *Carth.* 33. (2)

Out of the diocese] And that, as it seemeth, whether the see be full or vacant. For in the 13 or 14 *Ja.* in the case of one *Pickover*, it was resolved upon this statute, that if a bishopric within the province of Canterbury be void, and so the jurisdiction be de-

(*a*) *Cro. Car.* 339.

(*b*) *Sir T. Raym.* 91. 1 *Keb.* 651.

(2) If a party cited *as* within the jurisdiction of an ecclesiastical court, though actually resident within another jurisdiction, appear and submit to the suit, such original defendant, and, *à fortiori*, a defendant cited to see proceedings within *his* diocese, is subject to the jurisdiction. *Chichester* v. *Donegal*, 1 *Add. Rep.* 5. And see *Hetley*, 19. 1 *Vent.* 61. *Carth.* 33. 1 *Shower*, 161, &c.

volved to the metropolitan, he must hold this court within the inferior diocese, for such causes as were by the ecclesiastical law to be holden before the inferior ordinary; and the prothonotaries said it had been so formerly resolved. But a little before this, in the 11 *Ja.*, the contrary was resolved; that is, where one was cited out of his diocese before the archbishop of Canterbury, *as guardian of the spiritualities*, not only prohibition was denied, but it was further said, that if he had been cited before him as *metropolitan*, it would have been granted upon this statute. *Gibs.* 1000.

Or peculiar jurisdiction] That is, whether they be cited out of such peculiar to the arches, or before the ordinary within whose diocese the peculiar doth lie. And *Coke* said, that if a man be sued out of his diocese, yet if he be sued within his own proper peculiar, he is not within this statute. *Gibs.* 1006.

Where he shall be inhabiting] *H.* 8 *Ja.* an attorney in the king's bench was sued in the arches for a legacy; and for that [423] he inhabited in the diocese of Peterborough, prohibition was prayed and granted; because though he remained here in term time, he was properly inhabiting within the jurisdiction of the bishop of Peterborough. *Gibs.* 1006. 2 *Brownl.* 12.

But, *T.* 17 *C.* 2. when one was cited into the archdeacon of Canterbury's court, for not coming to church at Biddenden in the county of Kent, and pleaded that he was an inhabitant in the diocese of Chichester, the court declared, that if a man be cited within the diocese, though he be not an inhabitant there, but only comes there to trade or otherwise, yet this is not within the statute; and that if it were otherwise, there might be offences committed within the ecclesiastical law, which could not be punished at all; for men would offend in one county, and then remove into another, and so escape with impunity. *Gibs.* 1006. *Hardr.* 421.

But in the case of *Westcote* and *Harding*, *E.* 15 *C.* 2. when the suit was for tithes in the diocese of Sarum, where they lay, and prohibition was obtained upon the statute, because the defendant inhabited in London; the court, upon notice that the suit was for tithes, granted a consultation, and declared that that case was not within the statute: though the contrary seems to have been agreed, *T.* 9 *Ja.*, in the case of *Jones* and *Boyer*. *Gibs.* 1006. 1 *Lev.* 96. 2 *Brownl.* 27.

T. 1 *W.* *Woodward* and *Makepeace*, Woodward, who lived in the diocese of Litchfield and Coventry, but occupied lands in the diocese of Peterborough, was there taxed in respect of his land, as an inhabitant, towards a rate for new casting of the bells, and because he refused to pay was cited into the court of the bishop of Peterborough, and libelled against for this matter. And by the court; this is not a citing out of the diocese, for he

is an inhabitant where he occupies the land, as well as where he personally resides. 1 *Salk.* 164.

M. 11 *W.* *Machin* and *Molton.* In a declaration in attachment upon prohibition, the case was, that the plaintiff lived in Nottingham within the province of York, and there subtracted tithes, and then removed into Lincolnshire within the province of Canterbury. Afterwards he happened to go to York, and was sued there in the court of the archbishop for the subtraction aforesaid, and had a prohibition on the statute for citing him out of his diocese. But at last, after debate, a consultation was awarded,
[424] for that the subtraction of tithes is local, and by the statute of the 32 *H.* 8. *c.* 7. must be sued before the ordinary of that place where the wrong was done; otherwise in cases transitory, where the action follows the person of the offender: And, as it was argued by the counsel, this is not citing out of his diocese within the statute; because the diocese where he lives hath not a jurisdiction, and if he might not be cited in this case, the thing would be remediless and dispunishable. So if a peculiar is in two dioceses, and a man who dwells in one of the dioceses in the peculiar is cited to the court of the peculiar held in the other diocese; this is not a citing out of the diocese, because it is within the peculiar. 2 *Salk.* 549. *L. Raym.* 452. 534.

T. 5 *An.* *Willmett* and *Lloyd.* A difference in this case was taken by Holt, chief justice, where a man of another diocese is taken *flagranti delicto:* He said, where the party goes into another diocese, and is commorant there, and comes back casually into the first diocese, in such case the citation cannot be good; for suppose a man comes casually into the diocese of London, and commits a crime there, and then goes back to the diocese where he dwells, and then casually comes to London again, it seemeth that he cannot be here cited; but if he had been cited before he left London, then that would be *flagranti delicto.* *Holt's Rep.* 605. (3)

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(3) If a party cited *as* within the jurisdiction of an ecclesiastical court, though actually resident within another jurisdiction, appear and submit to the suit, such original defendant, (*à fortiori*, one cited to see proceedings by such original defendant,) is bound to the jurisdiction. And *quære* — Whether a citation of the wife, at the domicile of the husband, is not sufficient to found the jurisdiction of the court in a suit even of nullity of marriage against the wife, wheresoever the wife may be actually resident? *Chichester* v. *Donegal*, 1 *Add. Rep.* 5. 19. 1 *Hagg. Rep.* 7. *note.* Describing party in citation as in a wrong parish is cured by appearance. *Barham* v. *Barham*, 1 *Hagg. Rep.* 5. Where the original citation in a cause of office or criminal suit, called on the party to appear before the proper judge, but the copy of the articles delivered to defendant's proctor, misdescribed the judge, the variance was held fatal. *Williams* v. *Bott*, 1 *Hagg. Rep.* 1. Articles

Immediate judge or ordinary dare not, nor will not, convent the party] In archbishop *Parker's* register, we find the archbishop to have put benefices in another diocese under sequestration, by reason of the negligence of the ordinary; but this is an act only of voluntary jurisdiction. And before the reformation, we find the archbishop requiring bishops to proceed against particular persons in their dioceses, or shew cause why himself should not proceed. *Gibs.* 1007.

Be party] If the cause be begun before the archbishop, though the bishop or other judge (who was party in the cause) dieth whilst it is depending, and so the occasion ceaseth upon which it was first brought before the archbishop, yet he being in possession of it, it shall not be removed. *Gibs.* 1007. (*c*)

Make request or instance to the archbishop] *M.* 19 *C.* 2. In the [425] case of *Bolton* and *Bolton*, prohibition was prayed to the arches for citing out of the diocese of Worcester, and day given to shew cause. At the day, the plaintiff in the arches shewed letters of request from the bishop of Worcester; to which it was objected, that this ought not to come in upon motion, but ought to be pleaded; for the statute says, they shall only be admitted where the civil or canon law doth allow; and therefore it is a matter proper to be argued, that the court may be informed by civilians, whether the law allows it or not in the present case. But prohibition was denied in the king's bench and in the exchequer; in both which courts it was held sufficient to exhibit the letters of request upon motion, without putting the party to plead. Also it hath been ruled upon this statute, that the archdeacon cannot send a cause depending before him immediately into the arches; for that he hath no power to appoint another court, but only to remit his own court, and to leave it to the next: for since his power was derived from the bishop, to whom he is subordinate, he must yield it to him of whom he received it. *Gibs.* 1007. 1 *Lev.* 225.

In cases only where the law, civil or canon, doth affirm execution of such request or instance of jurisdiction to be lawful] It was held by the civilians, in the case of *Jones* and *Jones*, *T.* 9 *Ja.* that it

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for a criminal offence, as brawling, &c. may be in the name of the judge, as vicar general and official principal; but the omission of the latter is fatal. *Thorpe* v. *Mansell*, 1 *Hagg. Rep.* 4. On a citation to appear on a day fixed, and receive *articles*, &c. the defendant is not entitled to demand that the articles shall be delivered on the first court day, or that otherwise he should be dismissed. *Ex parte Denziloe*, 1 *Hagg. Rep.* 170.

(*c*) *Bp. of Carlisle's* case, *Cro. Jac.* 483. For, per *Doderidge J.*, by the civil law the death of the plaintiff or defendant is not any abatement of the libel, but they have a reviver, as we a re-summons in ravishment of ward; and the intent of the statute is not that such a cause should be remanded, whereby the plaintiff should lose the costs of his suit.

was absolutely in the power of the ordinary to send any cause to the archbishop at his will, without assigning any special reason; for which they cited the authority of divers canonists. But *Hobart* (and, as it seemeth, the court) said, that to expound the statute thus, to wit, that the ordinary may at his will and pleasure send the subject from one end of the kingdom to another without cause, was both against the letter of the statute, and did utterly elude it; that the purpose of the law was to provide for the ease of the subject more than for the jurisdiction of the ordinary, which appears, in that there is action given to the subject and penalty to the king for the vexation, but none to the ordinary; and that this very clause says, it is to be done in cases only which the civil or canon law alloweth; which would be a vain restriction, if it were
[426] left as general as before, that is, if it were lawful or tolerable in all cases, without cause. *Gibs.* 1007. *Hob.* 185. 2 *Brownl.* 27.

For causes of heresy] In the case of *Pelling* and *Whiston*, *H.* 8 *An.* which was a cause of heresy, Dr. Pelling appealed to the delegates from a refusal on the part of the dean of the arches, to cite Mr. Whiston before him, upon letters of request from Dr. Harwood, commissary of the exempt and peculiar jurisdiction of the dean and chapter of St. Paul's. The ground of the dean's refusal was, that letters of request from Dr. Harwood did not lie before him, because in a case of heresy the bishop of the diocese hath jurisdiction in places otherwise exempt within his diocese; and notwithstanding the statute of citations, an heretic may be cited to appear before him upon letters of request from the judge of the peculiar; heresy being none of the five cases in which a person may be cited out of the diocese or peculiar jurisdiction within which he dwells. *Gibs.* 1007. *Comyns*, 199.

For probate of any testament] In *Hughes's* case, *M.* 11 *Ja.*, where one who dwelt in Somersetshire had made his will, and his executors were libelled against in the arches; it was said by justice *Warburton* to have been agreed by all the justices, that the exception in this statute doth only extend to *probate of wills*: and prohibition was awarded. *Gibs.* 1007. *Godb.* 214.

But in the 24 & 25 *C.* 2. where one was cited out of the diocese, to answer a suit for a legacy, into the prerogative where the will had been proved, prohibition was denied; because there the executor must give account and be discharged. *Anon.* 1 *Ventr.* 233.

And by *Holt* chief justice, in the case of *Machin* and *Molton*, *E.* 11 *W.* If a will be proved in the prerogative court of Canterbury, a suit upon it for a legacy must be in the arches, which is the provincial court, though the party lives in another diocese. *L. Raym.* 453.

And in the case of *Edgworth* and *Smalridge*, *M.* 3 *G.* 2. where the case was, that a prohibition was prayed to a suit for a legacy in the arches against the executor, for that he was cited out of

his diocese, and it appeared that the testator having *bona notabilia* in several dioceses, his will was proved in the prerogative court of Canterbury; for the defendant it was insisted, that the exception of the probate of wills draws after it necessarily an exception of suits arising upon such wills proved; that the statute is an affirmance of the canon law; that by the canon law a will cannot be proved in the arches, nor can legacies be sued for in the pre- [427] rogative court, which is a point mistaken by the reporters, who say the legacy must be sued for where the will is proved; both the prerogative and the arches are within the archbishop's jurisdiction; and if the legatee is not suffered to sue in the arches, he can sue no where. And the court denied the prohibition. *Fitz. Gib.* 110.

Where *two* are executors, and one of them lives in the diocese of London, and the other in one of the peculiars of the arches, the suit against them as executors shall be in the arches. *Gibs.* 1005. (*d*)

By Can. 94. No dean of the arches, nor official of the archbishop's consistory, nor any judge of the audience, shall, in his own name, or in the name of the archbishop, either *ex officio* or at the instance of any party, originally cite, summon, or any way compel, or procure to be cited, summoned, or compelled, any person which dwelleth not within the particular diocese or peculiar of the said archbishop, to appear before him or any of them, for any cause or matter whatsoever belonging to ecclesiastical cognizance, without the licence of the diocesan first had and obtained in that behalf, other than in such particular cases only as are expressly excepted and reserved in and by a *statute*, 23 *Hen.* 8. *c.* 9. And if any of the said judges shall offend herein, he shall, for every such offence, be suspended from the exercise of his office for the space of three whole months.

By the ancient canon law, the archbishop of Canterbury, although not as archbishop, yet as legate of the pope, had a right to cite persons out of any diocese before him in his court of audience, originally, as well as upon appeal. *Gibs.* 1008. (*e*)

Return of the citation.

6. The return of the citation is either personally in court by him who executed the same, who certifieth and maketh oath how and in what manner the defendant was cited; or else it is by authentic certificate, which is a kind of solemn writing, drawn or confirmed by some public authority, and ought chiefly to contain the name of the mandatory or person to whom it is directed, and the name of the judge who directed the same, with his proper style and title, likewise the day and place in which the defendant was cited, and the causes for which he is cited; in testimony whereof, some authentical seal ought to be put to it, of some

(*d*) 1 *Roll. Rep.* 328. (*e*) X. 1. 30. 1.

archdeacon, official commissary, or rural dean; and it ought to express that they set their seal thereunto at the special instigation and request of the mandatory. To all which certificates, in all causes, as much credit is given as if the mandatory had personally made oath of the execution thereof.

But these authentic certificates are now but seldom used, unless when the mandatory, by reason of the distance, cannot conveniently appear to make oath. *Conset.* 28. 1 *Ought.* 50, 51.

Concerning this return of the citation, it is ordained by the aforesaid constitution of *Otho, that* the person by whom the citation shall be executed, shall not omit to certify to the judge what he shall have done in the execution thereof.

And by the aforesaid constitution of *Othobon:* He to whom the citation shall be committed, when he hath faithfully executed the same, shall make certificate thereof, according to the form of *Otho's* constitution aforesaid; otherwise no credit shall be given to a citation which shall appear to have been otherwise made, nor shall any process be directed thereupon for the person so said to be cited.

And by a constitution of archbishop *Peckham:* Whereas some rural deans are defamed for diabolical craft in citations, selling certificates thereof for money to fraudulent men, when no notice of the citation is given to the party concerned, either before making the certificate or afterwards, and so the innocent is condemned; for the cure of this we do ordain, that no certificate shall be delivered to any person, nor otherwise granted under the seal of a rural dean, *until the same shall have been publicly read upon some solemn day, during the solemnities of the mass, in the church where the person cited dwelleth*, or hath his most usual abode: adding, moreover, that the person cited shall have sufficient space allowed to him, that he may conveniently appear at the time and place appointed: and if in some cases they are so straitened for time, *that there is no room for delay;* then the citation being first publicly made before witnesses, the certificate shall be given in the church, *or in some public place*, before credible witnesses; so as that the day of the citation, and the place where, shall be expressed in the certificate. And in no wise shall the certificate be made before the citation. And the deans rural shall make oath for their faithful performance hereof, *in the episcopal synod every year. Lindw.* 81.

Until the same shall have been publicly read] That is, the certificate; which ought to contain the tenor of the mandate, and the form and manner of the execution thereof. *Lindw.* 82.

[429] *Upon some solemn day*] That is, some Sunday or holiday. *Lind.* 81.

During the solemnities of the mass] Immediately after the offertory. *Lind.* 81.

In the church where the person cited dwelleth] Or parochial chapel. *Lind.* 81.

That there is no room for delay] That is, for delaying the certificate till the next high mass. *Lind.* 82.

Or in some public place] Which may be nearer than the church; as in a market or fair, or other place of public concourse. *Lind.* 83.

In the episcopal synod every year] *Lindwood* supposeth the reason of this might be, that new deans were yearly elected; however the canon supposeth, that the bishop every year held his synod. *Johns. Pecch.*

7. By the aforesaid statute of the 23 *H.* 8. *c.* 9. No archbishop, nor bishop, ordinary, official, commissary, or any other substitute or minister of any of the said archbishops, bishops, archdeacons, or other having any spiritual jurisdiction, shall demand or take of any of the king's subjects, any sum of money for the seal of any citation to be awarded or obtained, than only 3*d.*; upon the pains and penalties before limited in this act, to be in like form recovered as is aforesaid. § 6. Fee.

Other fees relating to the same (exclusive of the stamp duties (4)) are to be regulated according to the particular customs of the several places.

Clerk of the parish. See Parish clerk.
Cluniacks. See Monasteries.

Coadjutor.

IN cases of any habitual distemper of the mind, whereby the incumbent is rendered uncapable of the administration of his cure, such as frenzy, lunacy, and the like: the laws of the church have provided coadjutors. Of these there are many instances in the ecclesiastical records, both before and since the reformation; and we find them given generally to parochial ministers (as most numerous), but sometimes also to deans, archdeacons, prebendaries, and the like; and no doubt they may be given, in such [430] circumstances, at the discretion of the ordinary, to any ecclesiastical person, having ecclesiastical cure and revenue. *Gibs.* 901. (*a*)

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(4) By 55 *G.* 3. *c.* 184. *Schedule. Part* II. A stamp duty of 5*s.* is imposed on every citation issuing out of any of the ecclesiastical courts and high court of delegates in ecclesiastical matters in England.

(*a*) In the *Decretal* of *Gregory*, a coadjutor is directed to be given

The powers conveyed at first, in general terms, the office of a coadjutor; and then, in particular, the looking after the cure, and receiving of the profits, and the discharging of the burthens; with an obligation to be accountable to the ordinary, when called upon. But the article of looking after the cure seemeth to be a late clause; there being no more in the ancient appointments of this kind, even since the reformation, than the administration of the revenues; which therefore exactly answers to the powers which were given to the coadjutors of bishops, who were appointed only to take care of the temporalties. And as there, the spiritual part was committed by the metropolitan to a bishop suffragan, so here it was committed by the diocesan to a curate duly licensed. Not but the office of coadjutor to an incumbent was always committed to a clergyman; who therefore, if not engaged in another cure, might be content to take upon him the spiritual part also, and have it accordingly committed to him by the bishop: but this was no part of the office of a coadjutor, as such; which, in the case of presbyters as well as bishops, did anciently relate to the temporalties only. *Gibs.* 901, 902.

In the reign of queen Elizabeth, the court of wards had taken upon them to commit the person and revenues of a lunatic incumbent, to a layman who was his near relation. Against this archbishop Whitgift objected, as an encroachment upon the ecclesiastical jurisdiction; and proved the charge by divers testimonies (to which many more might have been added) out of the records of Canterbury and London; whereby it appeared, that this had always been a cure belonging to the governors of the church. And the person to whom the custody had been committed, being cited to answer the allegations of the archbishop, and alleging nothing to the contrary, the court thereupon made the following declaration: "This court hath not any power or "jurisdiction to intermeddle or commit the spiritual or eccle-
[431] "siastical livings or possessions of any spiritual person that is "lunatic or *non compos mentis*; but the same resteth in the eccle- "siastical magistrates, to appoint and dispose, as formerly hath "been accustomed. But for his moveable goods, and temporal "possessions, the court will further consider thereof, and give "such order as therein shall appertain." In pursuance of which declaration, the archbishop committed the administration of the spiritual revenues to a clergyman, under the style of coadjutor; and did afterwards, by a separate instrument, commit the custody of the lunatic to the person who had been appointed for the whole care by the court of wards. *Gibs.* 902. (*b*)

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to a rector afflicted with leprosy; also to an archdeacon, who, from a paralytic complaint, had lost the use of speech. X. 3. 6. 6. See Bishop, IX.

(*b*) As in the time of archbishop *Abbot* we find the commission of

Codicil. See **Wills.**
Collation. See **Benefice.**

Colleges.

1. GENERALLY, colleges in the university are lay corporations, although the members of the college may be all spiritual. 2 *Salk.* 672. Colleges, lay corporations.

But the dean and chapter of Christ-church in Oxford is a spiritual, and not a lay body. *Bunb.* 209.

2. The universities from time to time have had ample privileges granted to them by sundry charters of the kings of this realm. Particularly, divers ancient charters were granted to the university of Oxford, by king John, king Henry the third, king Edward the first, and king Edward the third: with power of coercion of the contumacious, by imprisonment and expulsion; and also by the censures of excommunication, indulged to them by the popes of Rome (especially Innocent the fourth), and by the archbishops of Canterbury, the pope's legates. The university of Cambridge had the like privileges granted to them of ancient times; but most of their old charters were lost in the wars of king Henry the third, or perished in the burning of the town in the time of king Richard the second. Which king renewed or granted further privileges to both the universities; as did also divers other succeeding princes of this realm. *Duck.* 347, 8. Charters granted to the universities confirmed by statute. [432]

But divers of the powers and jurisdictions so granted to the universities being in law not grantable by charter, therefore it was enacted by the statute of the 13 *Eliz.* c. 29. as followeth:

For the great love and favour that the queen's most excellent majesty beareth towards her highness's universities of *Oxford* and *Cambridge*, and for the great zeal and care that the lords and commons of this present parliament have for the maintenance of good and godly literature, and the virtuous education of youth within either of the said universities; and to the intent that the ancient privileges, liberties, and franchises of either of the said universities heretofore granted, ratified, and confirmed by the queen's highness and her most noble progenitors, may be

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a coadjutor explained and enforced by special *rules and orders to be observed between the minister and his coadjutor, in point of profits, &c.*; so in the time of archbishop *Sancroft*, we first find a bond also given by the coadjutor for a faithful account to be made to the ordinary, or other spiritual judge to be appointed by him. *Gib. Cod.* 902.

had in greater estimation, and be of the greater force and strength, for the better increase of learning, and the further suppressing of vice; it is enacted, that the right honourable *Robert* earl of *Leicester*, now chancellor of the said university of *Oxford*, and his successors for ever, and the masters and scholars of the same university of *Oxford* for the time being, shall be incorporated and have perpetual succession, by the name of the chancellor, masters, and scholars of the university of *Oxford;* and likewise that the right honourable sir *William Cecil*, knight, baron of *Burghley*, now chancellor of the said university of *Cambridge*, and his successors for ever, and the masters and scholars of the same university of *Cambridge* for the time being, shall be incorporated and have perpetual succession by the name of the chancellor, masters, and scholars of the university of *Cambridge.*

And the letters patents of the queen's highness most noble father king *Henry* the eighth, made and granted to the chancellor and scholars of the said university of *Oxford*, bearing date the first day of *April* in the *fourteenth* year of his reign; and the letters patents of the queen's majesty that now is, made and granted unto the chancellor, masters, and scholars of the university of *Cambridge*, bearing date the twenty-sixth day of *April* in the *third* year of her reign; and also all other letters patents by any of the progenitors or predecessors of our said sovereign lady,
[433] made to either of the said corporated bodies severally, or to any of their predecessors, or either of the said universities, by whatsoever name or names the said chancellor, masters, and scholars of either of the said universities in any of the said letters patents have been heretofore named, shall from henceforth be good, effectual, and available in the law, to all intents, constructions, and purposes, to the foresaid now chancellor, masters, and scholars of either of the said universities, and to their successors for evermore, after and according to the form, words, sentences, and true meaning of every of the same letters patents, as amply, fully, and largely, as if the same letters patents were recited *verbatim* in this present act of parliament.

And the chancellor, masters, and scholars of either of the said universities, severally, and their successors for ever, by the same name of chancellor, masters, and scholars of either of the said universities of *Oxford* and *Cambridge*, shall and may severally have, hold, possess, enjoy, and use, to them and to their successors for evermore, all manner of manors, lordships, rectories, parsonages, lands, tenements, rents, services, annuities, advowsons of churches, possessions, pensions, portions, and hereditaments, and all manner of liberties, franchises, immunities, quietances, and privileges, view of frankpledge, law days, and other things whatsoever they be, which either of the said corporated bodies of either of the said universities had, held, occu-

pied, or enjoyed, or of right ought to have had, used, occupied, and enjoyed at any time before the making of this act, according to the true intent and meaning, as well of the said letters patents made by the said noble prince king Henry the eighth, and granted to the chancellor and scholars of the university of *Oxford*, bearing date as is aforesaid, as of the letters patents of the queen's majesty, made and granted unto the chancellor, masters, and scholars of the university of *Cambridge*, bearing date as aforesaid: and according to the true intent and meaning of all the other aforesaid letters patents whatsoever; and the same are hereby confirmed to them.

Provided, that this act shall not extend to the prejudice or hurt of the liberties and privileges of right belonging to the mayor, bailiffs and burgesses of the town of *Cambridge* and city of *Oxford;* but that they the said mayor, bailiffs, and burgesses, and every of them, and their successors, shall be and continue free, in such sort and degree, and enjoy such liberties, freedoms, and immunities, as they lawfully might have done before the making of this act.

By which blessed act (as lord *Coke* calls it), all the courts, franchises, privileges, and immunities mentioned in any letters patents, to either of the said universities, that they might prosper [434] in their study with quietness, are established and made good and effectual in the law; against any *quo warranto, scire facias*, or other suits, or any quarrel, concealment, or other opposition whatsoever. *4 Inst.* 227., *Hale's Hist. Com. Law.* 33.

3. But they have no jurisdiction unless the plaintiff or defendant is a scholar or servant of the university, or of some college; but if either of them is a scholar, it is then a matter within their jurisdiction: but yet, if either of them is entered into a college by collusion, to avoid a suit in the king's bench, or to excuse himself from town offices, his privilege shall not be allowed.

Jurisdiction where one of the parties is a member of the university.

Thus in the case of the city of *Oxford, M. 1 W.* On an action of debt against the defendant, a townsman in Oxford, for refusing to execute an office in the corporation; it was moved, that he being a servant of Dr. Irish, might have the privilege of the university; and a charter was produced, by which it was granted, that the members and servants of the university should be sued in the vice-chancellor's court, and not elsewhere; and a certificate from the chancellor, directed to the chief justice, that the defendant was matriculated and registered in the university; but it appearing to the court, that this was done two days and no more before he was chosen to this office, and that he was a painter by trade, and had lived several years in the corporation, and no servant attending Dr. Irish, the privilege of the university was not allowed. 2 *Ventr.* 106.

T. 3 Car. Wilcocks v. Bradell. Prohibition by Wilcocks

against Jane Bradell the wife of John Bradell, principal of St. Mary Hall in Oxford, and Christian the daughter of the said John Bradell, to stay their suits in the vice-chancellor's court of Oxford: for that whereas Jane Bradell had libelled against him in the vice-chancellor's court of Oxford, for calling her bawd and old bawd (which is termed the action of injury); and Christian the daughter had libelled against him for these words, scurvy whore and jade, and that he did strike her. For staying of these suits, sentence being given against him in both, Wilcocks prays to have prohibitions. And now the agent for the university moved for a consultation; and shewed the charters of the university in the 14 *R.* 2. and 14 *H.* 8., whereby is granted unto them, that they may inquire of all trespasses, injuries, and of all pleas and quarrels, and of all other crimes and matters (except pleas of frank-tenement), where a scholar or their servants
[435] or ministers is one of the parties, and that they shall have cognizance and correction therefore, according to their statutes and customs, or according to the law of England, at the discretion of the chancellor, so as the justices of the king's bench or of the common bench, or justices of assize, *se non intromittant;* and if the same justice shall take in hand to inquire, or in any wise to take cognizance, or intromit, then upon certificate or notification of the chancellor of the university or his commissary, they shall supersede such inquiry or cognizance, and shall not put the party to answer before them, but the said party shall be corrected and punished before the chancellor or his commissary only, in form aforesaid; and that these charters were confirmed by act of parliament in the 13 *Eliz.* And because Wilcocks was a scholar, and master of arts of the said university, it was prayed that the cause might be remanded. And it was much debated at the bar and bench, for that the parties were women, which were not any persons privileged there; and the defendant, who is the scholar, doth not desire that privilege, but would oppose it, and prayeth these prohibitions. But the court agreed, forasmuch as the charters are, that the university shall have cognizance of those pleas, where one of the parties is a scholar, and so the plaintiffs being thereby enforced to sue there, therefore the cause should be remanded. *Cro. Car.* 73.

But if an action be brought against a scholar and another who is not one; in this case the scholar (another being joined with him) shall not have the privilege or benefit of the charter. As in the case of *White* v. *W.* and *R. Lowgher*, 18 & 19 *El.* W. L. appeared and answered, but R. L. claimed the privilege of the university of Oxford. But because the said R. was joined with W. in the bill, who was not subject to the same jurisdiction, therefore the court ordered process to be awarded against him, to shew other cause why he should not answer. *Cary*, 79.

And in order to be entitled to this privilege, it must appear, that the person claiming it is resident in the university at the time. As in the case of *Mary Hays* and *Samuel Long*, clerk, *T. 6 G. 3.* in the common pleas: The plaintiff, having been prosecuted upon an indictment for keeping a bawdy house at Benson in the county of Oxford, and upon trial acquitted, brought an action against the prosecutor of the indictment. The university claimed cognizance; and the defendant makes affidavit, that he is and for 21 years past has been a member and student of the college of Christ Church, and that he is now resident there. Whereupon the court made a rule to shew cause why the claim of cognizance should not be allowed. Upon shewing cause, an affidavit was produced by the plaintiff, which swears, that the defendant generally resides, and is obliged to reside at Benson, where he has a college living; and though his name remains upon the books of the college, and he is still a member thereof, yet he has no room or chamber there to reside in. Thereupon it was insisted for the plaintiff, that cognizance of pleas ought not to be allowed to the university, for two reasons: first, because the cause of action arose at Benson, out of the university; secondly, for that the defendant had no right to the privilege of the university, he having ceased to reside there as a student and member thereof: and being obliged to reside upon his living at Benson, like the case of an attorney, after he has left off practising, and no longer attends this court, he shall not be entitled to privilege, notwithstanding his name remains upon the roll of attornies. By lord *Camden* chief justice: The charter extends to actions arising in any part of England: but surely it could never intend, that scholars, as plaintiffs, should have the privilege of suing in the university in causes of action arising in any part of England; but when they are defendants, this privilege extends all over England. The superior courts construe this privilege very strictly; therefore it ought to be made to appear clearly to the court, that the defendant is a scholar residing. Great numbers of persons remain on the books long after they have left the university, on purpose to vote for members, and the like; many who are fellows of colleges never go thither at all; but it would be strange, if this court should allow cognizance in cases where such persons are defendants: it is therefore absolutely necessary that residence should be proved to the court. And the claim of cognizance was disallowed. 2 *Wilson*, 310.

4. The chancellor's court hath authority to determine, not only civil, but also criminal offences or misdemeanors, under the degree of treason, felony, or maim. But the trial of treason, felony, and maim, by a particular charter is committed to the university jurisdiction in another court; namely, the court of the

How far it extendeth to criminal offences.

lord high steward of the university. For by a charter of June 7, 2 *Hen.* 4. (confirmed among the rest by the statute of the 13 *Eliz.*) cognizance is granted to the university of Oxford, of all indictments of treasons, insurrections, felony, and maim, which shall be found in any of the king's courts against a scholar or privileged person; and they are to be tried before the high steward of the university, or his deputy, who is to be nominated by the chancellor of the university for the time being. But when his office is called forth into action, such high steward must be approved by the lord high chancellor of England; and a special commission under the great seal is given to him, and others, to try the indictment then depending, according to the law of the land and the privileges of the said university. When therefore an indictment is found at the assizes, or elsewhere, against any scholar of the university, or other privileged person, the vice-chancellor may claim the cognizance of it, and (when claimed in due time and manner) it ought to be allowed him by the judges of assize; and then it comes to be tried in the high steward's court. But the indictment must first be found by a grand jury, and then the cognizance claimed: for it seemeth that the high steward cannot proceed originally to inquire; but only after inquest in the common law courts, to hear and determine. Much in the same manner as, when a peer is to be tried in the court of the lord high steward of Great Britain, the indictment must first be found at the assizes, or in the court of king's bench, and then (in consequence of a writ of certiorari) transmitted to be finally heard and determined before the lord high steward and the peers. When the cognizance is so allowed, if the offence be a misdemeanor only, it is tried in the chancellor's court by the ordinary judge. But if it be for treason, felony, or maim, it is then, and then only, to be determined before the high steward, under the king's special commission to try the same. The process of the trial is this: the high steward issues one precept to the sheriff of the county, who thereupon returns a panel of 18 freeholders; and another precept to the bedells of the university, who thereupon return a panel of 18 matriculated laymen: and by a jury formed half of freeholders of the county, and half of matriculated persons, is the indictment to be tried; and that in the guildhall of the city of Oxford. And if execution be necessary to be awarded, in consequence of finding the party guilty, the sheriff of the county must execute the university process; to which he is annually bound by an oath.——But there hath not been occasion to reduce this proceeding into practice, for above 100 years last past. 4 *Blackst.* 277.

Extendeth not to freehold.

5. *M.* 3 *Car. Halley's* case. In the common pleas: Ejectment, upon a lease of a messuage in Oxford. The defendant, being principal of Gloucester Hall in Oxford, pretended, that he being

a scholar in Oxford, and a privileged person, ought to be sued before the vice-chancellor in Oxford, according to the course of proceedings there, according to the custom of the university, and according to the charters of *Rich.* 2. and *Hen.* 8. confirmed by parliament. Wherefore he prayed that there might be a stay of proceedings in this court; and shewed their charters, that they had cognizance of all suits, contracts, covenants, quarrels, except concerning freehold: and this being a personal action, they ought to have cognizance thereof. And for the university was shewed an ancient record in this court, in the 22 *Ed.* 1. where a plea of covenant was brought in the court of the vice-chancellor of the university of Oxford, by reason of a contract made before that time, wherein was granted unto them, that they should have cognizance of all actions personal and contracts: and this covenant in question was, that he should enjoy such a house in Oxford for a year: and because this court of the common pleas had granted a prohibition to stay the proceedings in the said suit, being begun in the court christian before the vice-chancellor, the record mentioned, that upon the shewing of this charter, it appearing that the action was brought only upon a contract, and not for the houses, therefore a consultation was granted. And so it was prayed here, because this action was but personal, that they might have cognizance thereof. But all the court denied it, and affirmed, that the vice-chancellor had not any jurisdiction, nor might hold plea thereof; for in this action he shall recover possession, and shall have an *habere facias possessionem*, and thereby he that hath a freehold may be put out of possession: and it is not like the record shewn; for there it is only an action of covenant, wherein the plaintiff shall recover damages only, and therefore reason to grant a *procedendo* there; but here he shall recover possession: and therefore by their own rules they ought not to hold cognizance, nor have liberty to proceed in this case. Note, that by this ancient record it appeareth what are the privileges [it should rather be said, what were then the privileges] of the said university, and the jurisdiction of this court to grant a prohibition where they proceed in court christian in prejudice of the common law without resorting to the chancery. *Cro. Car.* 87.

H. 35 & 36 *Car.* 2. In the chancery: *Stephens* and *Berry.* The plaintiff exhibits his bill, to be relieved touching some lands in Cornwall; and the defendant, being head of Exeter College in Oxford, pleads the privilege of the university, and that he ought to be sued in the vice-chancellor's court in Oxford only. But his plea was over-ruled: for that matters of freehold are excepted out of the patent to the university; and their court can at best have but a lame jurisdiction as to lands in Cornwall. 1 *Vern.* 212.

H. 35 & 36 *C.* 2. *Draper* and *Crowther.* A bill was brought, [439]

setting forth a contract under seal with the defendant, for making a lease of certain lands in Middlesex, and to have execution of the agreement. The defendant pleaded the privileges of the university, to proceed in all quarrels in law and equity, except concerning freehold; and concluded to the jurisdiction of the court. But lord keeper *Guildford* over-ruled the plea; because in this case the university cannot sequester lands in Middlesex, and so can give no remedy: and the carrying this agreement into execution toucheth the freehold. 2 *Ventr.* 362.

T. 12 *An.* *Aldrich* and *Stratford.* A bill in chancery being brought for a discovery of the personal estate of Dr. Aldrich deceased, and an injunction granted thereupon; the university of Oxford claimed cognizance of the cause, for that both plaintiff and defendant were scholars of the university. Upon hearing counsel several times, and view of charters, and the statute of the 13 *El.* and precedents, *Harcourt* lord chancellor, ordered the bill to be dismissed, and allowed an exclusive cognizance in equity, touching *chattels*, to the university. 22 *Viner*, 11.

Whether the king's courts may interfere, where a visitor is specially appointed. (*a*)

6. *T.* 6 *W.* *Philips* and *Bury.* The plaintiff brings an ejectment against the defendant for the rectory house of Exeter college in Oxford, and declares upon a demise to him by John Painter, being now made rector, upon the deprivation of Dr. Bury. Upon the general issue pleaded, the jury find a special verdict. They find that Exeter college in Oxford (to the rectors and scholars of which the rectory house appertaineth) was founded by Walter

(*a*) Where the poor, or those who receive a charity, are not incorporated, but there are certain trustees who dispose of the charity, there is no visitor; because the interest of the revenue is not vested in the poor that have the benefit of the charity, but they are subject to the orders and directions of the trustees. (See Charitable Uses.) But where they who are to enjoy the benefit of the charity are incorporated, there, to prevent all perverting of the charity, or to compose differences that may happen among them, there is by law a visitatorial power; and it being a creature of the founder's own, it is reason that he and his heirs should have that power, unless by the founder it is vested in some other. Per *Holt* in *Phillips* v. *Bury*, 2 *T. Rep.* 352. And in default of a special appointment, and heirs of the founder, this power devolves on the king. [*Vid. Rex* v. *Catherine Hall, infra, notis.* When the king is founder, the crown is always visitor; but where a private person is founder, his heirs are visitors: but the founder may vest a visitatorial power in any other person, or his heirs. *Eden* v. *Foster*, case of *Birmingham School*, 2 *P. Wms.* 325. *Gilb. Rep.* 178. *Sel. Ch. Cas.* 36. In the latter case, the visitor being local, the court cannot interpose by granting a commission. *Atto. Gen.* v. *Price*, case of *Berkhampstead School*, 3 *Atk.* 108. Local visitors only visit every three years, but may hear complaints in the mean time; and it was said, that if a visitor's reward is too small, the court may augment it.] *Ib.*

Stapleton, bishop of Exeter, for a rector and a certain number of fellows: that the rector and fellows are a body politic, incorporated by letters patent of queen Elizabeth, by the name of rector and fellows of Exeter college in Oxford: they also find divers statutes of the college; they find one which appoints the bishop of Exeter and his successors to be visitors, but that he ought not to visit *ex officio* but once in five years (unless he be requested by the rector and four of the seven senior fellows), and that this visitation ought not to continue longer than three days; they find also another statute, which enables the visitor to deprive the rector, if he obtain the concurrent assent of the seven senior fellows, in case the rector misbehave himself; they find another statute, which enables the rector to deprive any of the fellows for incontinency or other offences there specified. The jury find further, that the defendant Dr. Bury was made rector of Exeter college in the year 1689: that he, upon the 16th of October in that year, deprived Mr. John Colmer, one of the fellows, for incontinency: that John Colmer entered his appeal with the bishop of Exeter, visitor of the college, who, after having heard his appeal, sent his chancellor, in March, 1690, with him to the college, to restore him: that the rector and the seven senior fellows denied to give him admittance: they find that the bishop of Exeter issued his citation for appointing a visitation the 16th of June following, which citation was served upon the defendant, then rector, by Webber; that the bishop upon the 16th came to the college, where he found the gates of the college shut against him, so that he could not obtain admission: that the bishop then and there administered an oath to Webber, concerning the service of the citation: they find, that upon the 20th of July in the same year, the bishop issued another citation for appointing a visitation to be held the 24th following: they find that upon the 24th the bishop held a visitation: that upon the 25th he suspended five of the seven senior fellows for contumacy: that upon the 26th, with the consent of the then seven senior fellows, he deprived the defendant, then rector, for contumacy: that Mr. Painter was then made rector, and entered in the premises, and demised to Philips, the plaintiff, for a term of years, who entered; and that the defendant entered upon him, and that the plaintiff brought this ejectment. After several arguments at the bar in this case, the court of king's bench were divided in opinion; the three puisne judges, *Gregory*, *Giles Eyre*, and *Samuel Eyre*, were of opinion, that judgment ought to be given for the defendant: *Holt* chief justice, on the contrary, held that it ought to be given for the plaintiff. The principal and leading point in this case was, whether the court of king's bench had any jurisdiction to examine into the proceedings of the visitor of the college, and to give relief to the party oppressed by them. The three

judges who argued for the defendant resolved, that to the king's bench belongeth authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial tending to the oppression of the subject; for which they relied on *Bagge*'s case, 11 *Co.* 28. They also held, that a college is a temporal or lay corporation, of the same nature with an hospital. And they took the difference in *Bagge*'s case, that if a layman be patron of an hospital, he may visit it, and depose or deprive (upon good cause) the master: but if he deprive him without just cause, and by colour thereof the master be ousted, he shall have an assise; because the common law will not permit any person grieved to be without remedy. And though the founder had an absolute power over his foundation, yet he could not exclude the jurisdiction of the common law; no more than if a man should devise lands between A. and B., and his intent was, that if any difference should arise between them about the lands, it should be determined by C. without process: this appointment would be vain, and the party grieved might have his remedy by the law. Besides, that the law will not allow any custom, which in any manner may tend to the support of arbitrary power; and for this reason will not permit the visitor to be without controul.
[442] And for these reasons they were of opinion, that they had here jurisdiction (the whole matter being found specially) to examine and correct the erroneous proceedings (if such they were) of the visitor. But they agreed, that if the ordinary deprive a master, who is ecclesiastical, without just cause, he shall not have an assise, because he hath other remedy by appeal; as in *Coveney*'s case, *Dyer*, 209. *Holt* chief justice (*b*), on the contrary, for the plaintiff argued, that there are two sorts of corporations, the one constituted for public government, the other for private charity. The former being duly created, although there are no words in their creation for enabling their members to purchase, implead or be impleaded, yet they may do all these things, for they are all necessarily included in and incident to their creation: and these sorts of corporations are not subject to any founder or visitor, or particular statutes, but to the general and common laws of the realm; and by them they have their maintenance and support. But the latter sort of corporations, which are constituted for private charity, are entirely private, and wholly subject to the rules, laws, statutes, and ordinances which the founder ordains, and to the visitor whom he appoints, and to no others. And if the founder hath not appointed any visitor, then the law appoints the founder and his heirs to be visitors. For visitation (he said) was not introduced by the canon law, but of necessity was created by the common law. Patronage and visitation both

(*b*) See a full note of lord *Holt*'s argument, 2 *T. Rep.* 346.

rise from the founder; and the office of the visitor by the common law is, to judge according to the statutes of the college, to expel and deprive upon just occasions, and to hear appeals of course. And from him, and him only, the party grieved ought to have redress; and in him the founder hath reposed so entire confidence that he will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever. As to the objection of the other side, that if the master of an hospital be deprived by the patron without just cause he may have an assise, and that a college and hospital are of the same nature; he agreed, that a college and hospital were of the same nature; but as to the objection that the master may maintain an assise, he answered, that the master could not maintain an assise, because he is not sole seised; and of that opinion (he said) *Hale* [443] chief justice had been often heretofore: and for this reason he denied the opinion in *Coveney's* and *Bagge's* cases to be law, as *Hale* chief justice had done before: besides that these cases are grounded upon an error; for they rely upon the 8 *Ass.* 29, 30. for warranting that opinion, where in truth the same doth not warrant any such opinion. Upon the whole, he concluded, that this college was a private corporation; that the founder having created the bishop visitor, the justice of his proceedings was not examinable in this court, or in any other: for which reasons he was of opinion, that judgment ought to be given for the plaintiff. But the three other justices being of a contrary opinion, judgment was entered for the defendant. *Lord Raym.* 5. 4 *Mod.* 106. 109, 110. *Skinn.* 447.

Upon this a writ of error was brought in parliament; and the judgment was there reversed. In the argument whereof bishop *Stillingfleet* spoke to this effect; That this absolute and conclusive power of visitors is no more than the law hath appointed in other cases, upon commissions of charitable uses: that the common law, and not any ecclesiastical canons, do place the power of visitation in the founder and his heirs, unless he settle it upon others: that although corporations for public government be subject to the courts of Westminster-hall, which have no particular founders, or special visitors, yet corporations for charity, founded and endowed by private persons, are subject to the rule and government of those that erect them; but where the persons to whom the charity is given are not incorporated, there is no such visitatorial power, because the interest of the revenue is not invested in them; but where they are, the right of visitation ariseth from the foundation, and the founder may convey it to whom and in what manner he pleaseth; and the visitor acts as founder, and by the same authority which he had, and consequently is no more accountable than he had been: that the king by his charter can make a society to be incorporated, so as to

have the rights belonging to persons, as to legal capacities: that colleges, although founded by private persons, are yet incorporated by the king's charter; but although the kings by their charters made the colleges to be such in law, that is, to be legal corporations, yet they left to the particular founders authority to appoint what statutes they thought fit for the regulation of them. And not only the statutes, but the appointment of visitors was left [444] to them, and the manner of government, and the several conditions on which any persons were to be made or to continue partakers of their bounty. But that which is particularly to be observed is, that these founders of colleges did take special care to prevent, as much as possible, all law suits among the members of their societies, as most destructive to the peace and unity of their body, and the tranquillity necessary for their studies: for they knew very well, that if any encouragement were given to suits at law, those places would in time become nurseries for attorneys and solicitors, which would pervert the main design of their foundation. *Walter de Merton*, the first founder of a college in Oxford with revenues to support it, took such care about this, that he puts the case in his statutes, of a warden's being deprived: and knowing that men are apt to complain when they suffer, and to endeavour one way or other to be restored (which causeth great heats and animosities among the contending parties), therefore to prevent these mischievous consequences, he puts a chapter in on purpose in his statutes, that if such a case should happen, *nulla actio, nullum juris remedium canonici vel civilis habeat*. And so in the statutes of Exeter college it is expressly mentioned, that if the rector be deprived by the commissary, he may appeal to the bishop, as visitor; but if he be deprived by the visitor himself, then no farther appeal is allowed, nor any remedy *juris aut facti*. If the statutes did allow of *defensiones legitimæ*, as those of Magdalen college do; no doubt they may make use of them, within those bounds which the statutes allow: but here it is otherwise, for the persons deprived are bound to acquiesce in the sentence passed upon them; and that with regard to the good of the college more than their own. And the true account (he says) of such causes first coming into Westminster-hall was this: soon after the restoration, one Dr. Withrington, fellow of Christ's college in Cambridge, was deprived of his fellowship by the master and fellows; he appealed to the king's bench, and craved a mandamus to be restored. (*r*) In the arguments in that cause, one of the learned judges of that court affirmed, that the first precedent of that kind was not above ten years before, during the time of Cromwell's usurpation. And that was the case of one *Hern*, who obtained a mandamus

(*r*) 1 *Keb.* 234.

to restore him to a place he was deprived of in the university, when Glyn was chief justice. And the reason given was, because there was then no special visitor: for the archbishop of Canterbury was local visitor; and there was then no archbishop. After this, in the year 1655, one Craford made application to the king's bench, to be restored to the place of schoolmaster in Cambridge, of which he was deprived by the proper visitors, the master and fellows of Gonville and Caius college; and upon several arguments it was denied, and resolved that no writ of restitution should be granted: but the matter was referred to the chancellor and others. (*d*) And so the court of king's bench, in Mr. *Withrington's* case, declared he could have no restitution from thence; because his appeal lay to the proper visitor, who was *fidei commissarius*, that is, the law trusted him with the discharge of his duty. In the 14 *Car.* 2. Dr. Patrick was chosen master of Queen's college in Cambridge, by a majority of fellows, but another was admitted: upon which he appealed to the king's bench; but some of the judges said positively, that no writ ought to have been ever granted upon differences in colleges, and that the appeal lay to the local visitor, and not to the king's bench. It was then urged, that it was a matter of freehold, and that it was no spiritual corporation, but the appointing of a master was a temporal thing: notwithstanding, the chief justice declared, that it would shake the whole government of colleges, to give remedy in that court. (*e*) In the 22 *Car.* 2. one *Daniel Appleford* was deprived by the local visitor of his place in New-college: he brings the matter to the king's bench, where the lord chief justice *Hale* then sate: the case was argued by learned counsel on both sides; but the lord chief justice said, If there be a jurisdiction in the visitor, and he hath determined the matter, how will ye get over that sentence? And at this rate (he said) we may examine all suspensions and deprivations; and so where will there be an end? And finally, the bishop observed, that although it be very possible for a visitor to go beyond his bounds (for none are infallible), yet if such a case be put, it is better that one person suffer, than that the discipline, government, and peace of the college be in danger of being utterly destroyed. 2 *Still.* Case of *Exeter College*. [445]

And the same doctrine appears to have been held and admitted in Dr. *Bentley's* case; for although the court did proceed to take cognizance in that cause, yet it was not for that they would interfere with the visitor's power, but because no visitor was set forth in the return to the mandamus: as will appear from the reports both of lord *Raymond* and sir *John Strange*, upon the

(*d*) *Sty.* 157. (*e*) *Sir T. Ray.* 101. and 1 *Lev.* 65.

different arguings of that case in the court of king's bench. The case was thus:

T. 9 *Geo.* *The King* against *the Chancellor, Masters, and Scholars of the University of Cambridge.* Mandamus to restore *Richard Bentley* to his academical degrees of bachelor of arts, master of arts, bachelor of divinity, and doctor of divinity. To this they return, that the university of Cambridge is an ancient university, and a corporation by prescription, consisting of a chancellor, masters, and scholars, who time out of mind have had the government and correction of the members, and for the encouragement of learning have conferred degrees, and for reasonable causes have used to deprive: that time out of mind there had been a court held before the chancellor or vice-chancellor, for the determining of all civil causes, where one of the parties is a member of the university; and that queen Elizabeth, by letters patent bearing date the 26th day of April in the third year of her reign, granted them cognizance of pleas, and to be a court of record: that in the 13th *Eliz.* this and all other charters of the university were confirmed by act of parliament: that at a court held the twenty-third day of September, 1718, according to the usage of the university, before Thomas Gooch, D.D. then vice-chancellor, one *Conyers Middleton*, D.D. a member of the university, levied a plaint in debt for 4*l.* 6*s.* against the said *Richard Bentley*, and prayed process against him: that thereupon, according to the custom of the university, a process issued to Edward Clark the beadle, to compel the said Richard Bentley to appear at the next court: that before the return, the beadle waited upon the said Richard Bentley at his lodgings within the jurisdiction, and shewed him the process, and served him with it; and upon discourse between them concerning the process and the vice-chancellor, Bentley contemptuously said, the process was illegal and unstatutable, and that he would not obey it; that he took the process out of the hands of the beadle, saying, the vice-chancellor was not his judge, and that he acted foolishly: that at the next court, held the 3d of October, 1718, Middleton appeared and declared in debt for 4*l.* 6*s.*; and the register of the court ex-
[447] hibited a deposition of the beadle touching the contempt; which being read, the said Richard Bentley, according to the usage of the university, was suspended from all his degrees: that time out of mind there hath been a custom, for the chancellor or vice-chancellor to summon a congregation, consisting of such and such particular members, who are specified in the return; who have used to examine and determine all matters relating to the university, and to take away degrees for contumacy or other reasonable cause: that a congregation was held the 17th of October, 1718, when the vice-chancellor declared this whole matter to them, and desired their judgment upon it; after which, having read the

deposition and the several acts of court, the said Richard Bentley, by judgment of the congregation aforesaid, was degraded: that he has not yet submitted himself to the authority of the said university: and therefore that for these causes (saving the authority of the university) they cannot restore him.

It was argued by Cheshyre serjeant, for a peremptory mandamus; that the return was insufficient for the uncertainty in divers instances; that deprivation of academical degrees is now become a matter of great consequence, because there are many preferments and privileges which by act of parliament can only subsist in dignified clergymen, so that those degrees which at first were only titles of honour, do now affect men in their freeholds and possessions: that the causes alleged are none of them sufficient to warrant a suspension; that if they were sufficient, yet that the proceeding itself was illegal, and particularly because here was no notice given to Bentley to come in and defend himself against the charge of contempt; that if the vice-chancellor's suspension was legal, yet the deprivation by the congregation was not so, not only because also in this case there was no summons to appear before the congregation, but likewise because the accusation was not made out to them in a proper manner, being only upon the narration and report of the vice-chancellor.

On the other hand, it was argued by Comyns serjeant, for the university; that the nature of the proceeding at the suit of Dr. Middleton is no more than an outlawry or excommunication, to compel the appearance of the party: that the return amounts to showing a jurisdiction to hold plea, an action properly instituted against him, his contempt to the court for which he was suspended, and afterwards upon his non-submission deprived; that it is true, degrees in the universities were first introduced to encourage learning and learned men, but then it is no consequence that if learned men misbehave themselves they may not be suspended or deprived: that it is agreeable to the methods both of the common and civil law courts, to punish contemptuous words without calling in the party, and giving him an opportunity to commit the like a second time: that the method of the whole proceeding, both as to the suspension and what was done by the congregation, being according to the course of their own courts, is right, although it may not tally with the method of common law proceedings. [448]

Pratt chief justice: This is a case of great consequence, not only as to the gentleman who is deprived, but likewise as it will affect all the members of the university in general. I think the return hath fully justified us in sending the mandamus, as it shows that the power of the vice-chancellor and the congregation is only to deprive for a reasonable cause; and as it is not pretended there is any visitor, or any other jurisdiction to examine

into the reasonableness of the deprivation, but that of this court. It is the happiness of our constitution, that, to prevent any injustice, no man is to be concluded by the first judgment; but that if he apprehends himself to be aggrieved, he hath another court to which he can resort for relief; for this purpose the law furnishes him with appeals, with writs of error and false judgment: and lest in this particular case the party should be remediless, it was become absolutely necessary for this court to require the university to lay the state of their proceedings before us; that if they have erred, the party may have right done him, or if they have acted according to the rules of law, that their acts may be confirmed. As to the proceeding against Dr. Bentley, it must be agreed, that the vice-chancellor had cognizance of the cause, and so the suit was well instituted against him. I must likewise take the process to compel an appearance to be regular, being averred to be according to the course of that court. As to Dr. Bentley's behaviour upon being served with the process, I must say it was very indecent; and I can tell him if he had said as much of our process, we would have laid him by the heels for it: he is not to arraign the justice of the proceedings out of court, before an officer who hath no power to examine it. When he said the vice-chancellor acted foolishly, it was what he might have been bound over for to his good behaviour: but I believe it is
[449] also established, that such a behaviour will not warrant a suspension or deprivation. I cannot think the evidence of this contempt was sufficient: it doth not appear to have been upon oath as it should have been. But be these matters how they will, yet surely he could never be deprived without notice. I do not observe but it is a total deprivation, and not temporary only, as was said at the bar. As to the proceedings before the congregation; it doth not appear they reheard the matter, any otherwise than by the relation of the vice-chancellor: they should have adjudged all the facts again, and have averred, that the deprivation was for them: whereas the saying, that for these causes they deprived him, amounts to no more than that the vice-chancellor told them so. The vice-chancellor's authority ought to be supported for the sake of keeping peace within the university: but then he must act according to law, which I do not think he has done in this case.

Powis justice assented.

Eyre justice. The university, unless they had a visitor, are certainly accountable to this court. As to the deprivation, I am not satisfied, that for a contempt to the vice-chancellor's court, the congregation (which is another court) can deprive: for it is not a contempt to the university in general; and it is not said in the return, that for contempts to the vice-chancellor the congregation can deprive. Every court hath a power to punish con-

tempts to itself; but I never till now heard of one court's resenting a contempt to another. But surely for a contempt they cannot deprive: or if they could deprive, it can never be done without notice. Though the vice-chancellor had jurisdiction in this matter, yet, in virtue of our superintendency over all inferior jurisdictions, we must take care he do not abuse his authority. Thus we do prohibit the spiritual courts till they give a copy of the libel in all cases within their jurisdiction.

Fortescue justice. If they had returned a visitor, it would be something; but without that, they must submit to the judgment of this court: which is no more than exempt jurisdictions (as, the county palatine, which hath *jura regalia*) do. A deprivation can never be the proper punishment for a contempt: because it cannot hold in the case of under-graduates. I think the behaviour of Dr. Bentley was a contempt, for which he might be bound to his good behaviour, as it was out of court. There is another thing considerable in this case, whether, upon any account, the university can deprive a man of his degrees; because [450] he is in from the crown, whence the power originally flows. Besides, the objection for want of notice can never be got over: the laws both of God and man do give the party an opportunity to make his defence, if he has any. *Str.* 557.

Afterwards, *H.* 10 *Geo.* This case was argued a second time by Mr. Reeve for a peremptory mandamus; that indeed if the university had returned that the king was their visitor, as they might have done, it would have put an end to the dispute here; but not having returned that they had a visitor, if it appears by the return that the proceedings in the university have not been agreeable to the rules of justice, a peremptory mandamus ought to issue: that when degrees in the university are conferred upon a person, he hath thereby a freehold in them, and will be entitled to several privileges and advantages annexed to them by acts of parliament, of which this court must take notice: that as to the clause in queen Elizabeth's charter, that no other justice or judge shall intromit, this is no more than a grant of cognizance of pleas exclusive of other courts, and must be governed by the rules the law hath provided relating to such sort of grants, by which the courts above are not deprived absolutely of jurisdiction; for if an action is commenced in this court against a scholar of the university, the university may claim cognizance of the plea by virtue of these letters patent and the act of parliament, and if they make their claim properly and in time, it must be allowed, and the proceedings here will be stopt; but if the university doth not make their claim the first day, this court will proceed notwithstanding this grant; and so it was held, *H.* 11 *Ann.* in the case of *Perne* and *Manners*, where an action upon the case was brought against the defendant, a member of the university, in-

habiting within their jurisdiction; the bill was of Easter term 11 *Ann.*, and the defendant had an imparlance till the first day of Trinity term following, after which, and before plea pleaded, the university of Cambridge, by their attorney, demanded cognisance, and set out the letters patent and act of parliament before mentioned; and the claim was disallowed, because it was not made the first day; and they held, that the act of parliament in this case made no difference, because it confirmed this franchise only as it was granted, namely, a grant of exclusive cognizance, but

[451] the claim of it must be according to the rules of the law. He admitted, that the facts set out in the return were contempts to the vice-chancellor's court, which they might have punished, if they proceeded according to the rules of law. He said, that court was a court of record, and therefore might have set a fine, and imprisoned the party till it was paid, which is a proper punishment for a contempt; but that suspension is not a proper punishment for a contempt: that a corporation cannot suspend a member of their body for a contempt to one of their courts; and if they had returned a custom to suspend for a contempt, it would be an unreasonable custom, and void: that although the return is, that they may deprive for a reasonable cause, yet here is no reasonable cause; for it cannot be reasonable for the congregation to degrade for a contempt or contumacy to another court; and it is not said that he was guilty of contumacy to the congregation: and besides, that it came very oddly before the congregation; for it did not come by way of appeal, but by the vice-chancellor's narration or report. But he relied upon it, that there was a fatal fault in the return which could not be answered; which was, that it did not appear the doctor was summoned, or had notice of these proceedings against him, so that he had no opportunity to make his defence: and to condemn a person without hearing him, or giving him an opportunity of defending himself, is contrary to natural justice, and such proceedings have been always held illegal and void by this court.

Yorke, attorney general, on the other side argued for the university. He said, as to the point of want of summons, he did admit, unless this case could be distinguished from the cases of members of corporations, it would be against the university. The case, he said, was of great consequence; because the franchises and privileges of the university were concerned on the one hand, and the rights and liberties of the members thereof on the other. He observed that there were two general questions in this case: the one, whether a writ of mandamus will lie, to restore Dr. Bentley to his academical degrees; the other, whether the cause of depriving the doctor of his degrees, set out in the return, is sufficient, and the return good. As to the former, he said, that the court having already determined that the writ of mandamus was good, and did well lie: he would acquiesce

under that determination: but as the other side had agreed, that if the university had returned a visitor, it would have put [452] an end to this mandamus; so he could not but observe, that if there was a visitor, if the doctor was aggrieved by these proceedings of the university, he might have made his application there. As to the second point, the return consisteth of two parts; first, the suspension by the vice-chancellor's court; and secondly, the degradation by the congregation. As to the former of these, namely, the validity of the suspension by the vice-chancellor's court, it was objected (he observed) that Dr. Bentley was not heard in that court against the contempt, and that it is against natural justice a man should be condemned without being heard: unto which he answered, that it must be admitted there was no necessity that Dr. Bentley should be actually heard; but if he had an opportunity to be heard, that would be sufficient: now he had an opportunity to be heard; for he was served with process to appear at the next court, and if he had paid obedience to that process, he had heard the charge against him, against which he might have made his defence: that there was no necessity to issue out a summons, or to give him new notice, to come and answer the contempt; for if a person commits a contempt to this court, or to the court of chancery, by declaring he will not obey the process of the court, by beating an officer executing the process of the court, or by speaking, reflecting, or contemptuous words of any of the judges, upon an affidavit made of the fact, he will be committed, without hearing him; for it is looked on to be a vain thing, when he hath committed a contempt before, to make a rule of court to give him an opportunity of committing a new contempt against it. This is the rule in this court and in chancery: and it is also the rule in the canon and civil laws. And that is considerable in this case, because the proceeding of the vice-chancellor's court is according to those laws. By the civil law they may proceed against a contumacious person, without any new citation. And the proceedings in the vice-chancellor's court being according to the rules of the civil law, though this court should examine them, yet they must be examined according to the rules of that law. The cause of suit was within the jurisdiction of the vice-chancellor's court, and this was a contempt in that cause; and if that court had a jurisdiction, all the objections as to the irregularity of the proceedings will be out of the case. Their proceedings are confirmed by the queen's letters patents, as far as she could do it; but the crown cannot erect a court to proceed according to the civil law by charter, therefore an [453] act of parliament was necessary: an act accordingly passed, to confirm the letters patent, in which letters patent the exclusive words are exceeding strong, as well as the confirmation of all

their liberties and privileges. But it hath been objected, that it is not enough to say, Dr. Bentley was suspended according to the custom of the university, but there ought to be a custom particularly set out for that purpose: to which he answered, that in proceedings in inferior courts, it is always allowed to say, they were according to the custom of the court. As to the objection, that suspension from the academical degrees is not a proper punishment for a contempt to a court; he answered, that by the rules of the civil law it is the only proper punishment. And it is like an outlawry in the temporal courts; it is to compel the party to come in and answer; and upon his doing that, the suspension is taken off. And these degrees cannot properly be called freeholds, nor civil temporal rights: they were originally only in nature of licences to professors in several professorships, and are now titles of distinction and precedence. The power of granting degrees flows from the crown. If the crown erects an university, the power of conferring degrees is incident to the grant. Some old degrees the university hath abrogated, some new ones they have erected; and they are taken notice of in acts of parliament for collateral purposes; and though the acts have annexed collateral privileges to them, that will not alter the nature of them, nor take away the power the university had over them before. It doth not follow, that if temporal rights are annexed to these degrees, the university would be deprived of their power of degrading. A bishop hath a freehold in his bishopric, and a right to sit and vote in parliament; yet he may be deprived by his metropolitan. And if courts have a jurisdiction and power to proceed by rules different from the common law, this court will not examine into the regularity of their proceedings on a mandamus. And therefore if a mandamus is granted to restore a fellow of a college; if they return a visitor, though his sentence hath been irregular, it is not examinable here. So if the ecclesiastical court excommunicate a person without a citation, this court will not grant a prohibition, but the party must appeal. When a prohibition is granted to the vice-chancellor's court, for not granting a copy of a libel; that is by reason of the express words of an act of
[454] parliament. And if an act of parliament should enact, that no certiorari should lie, to remove convictions of justices of the peace for such and such offences; though the justices should convict the party without summoning him, no certiorari would be granted by this court, to remove such a conviction. As to the objection, that by this means the vice-chancellor's court would have an uncontroulable jurisdiction without appeal, and that it is unreasonable a man should be concluded by the first determination; he answered, that an appeal lay from the vice-chancellor's court to the congregation. And then as to the de-

gradation by the congregation, he said, that the whole proceeding against Dr. Bentley ought to be considered as the act of the court of the university. For by the letters patent the grant is to the chancellor, masters, and scholars, that they, to wit, the chancellor, masters, and scholars, which is the whole body of the university, and their *loca tenentes*, should have cognizance; and therefore the congregation are to be considered as the judges of the court, and the vice-chancellor only as their official; that the court usually held before the vice-chancellor might be held before the congregation; that by the civil law, where there is a commissary, he hath only part of the jurisdiction, the rest remains in the ordinary; and that the ordinary may proceed upon a report made by his official. So there the congregation might proceed upon the report of the vice-chancellor (which in this case he made to them). As to the objection, which he said had been made, that if the degradation stood, Dr. Bentley would be deprived of his degrees without ever being heard, without prospect of being restored, he answered, that this was but in nature of a process to compel Dr. Bentley to appear; and that it is the general rule of all courts, and of all laws, that when the party comes and clears his contempt, he shall be restored; that this privilege of suspending degrees, and degrading, was agreeable to the privileges which all other universities enjoyed; and that it was necessary that universities should have a summary method of proceeding. For which reasons he insisted the return was good, and that no peremptory mandamus ought to issue.

Mr. Reeve, by way of reply, insisted, that though great stress had been laid upon the allegations in the return in its several parts, that the facts were done according to the custom of the university, this was not sufficient to make the return good. For the grant in the letters patent of queen Elizabeth is, that the [455]
university should hold a court according to their laws and customs before that time used; therefore, if they have a method of proceeding by the civil law, which hath been always used, that ought to have been averred specially; and without it this court cannot take notice of it under that general allegation, but must intend the proceedings are according to the rules of the common law. It is true, in cases of inferior courts, such an allegation is enough, because their proceedings are agreeable to the common law; but if the rules of the common law are to be excluded, such a custom must be specially set out. And as to the objection, that the vice-chancellor's court is part of the congregation, and that the congregation is held before the whole body; the first is not alleged so to be in the return; and as to the last, the congregation consists of the chancellor or vice-chancellor, or

his *locum tenens*, and the regents and non-regents, which is not the whole body of the university.

On the 7th of February 1723, the lord chief justice *Pratt* delivered the opinion of the court, that the return was ill; because since it is not shewn in the return, that the proceedings in the vice-chancellor's court or the congregation are according to the rules of the civil law, they must be intended to be agreeable to the rules of the common law; and if so, it not appearing the party hath any redress by applying to another court, this court will relieve him, if he hath been proceeded against, and degraded, without being heard, which is contrary to natural justice. This case therefore will fall under the rules for removing of members of corporations; which cannot be done without summoning the party, and giving him an opportunity of being heard. The cases determined upon that head are so numerous, and the rule so well settled and known, that it cannot now be disputed; for want of doing which, the suspension or degradation cannot be supported. And therefore a peremptory mandamus was granted. *L. Raym.* 1334. [3 *Burr. Rep.* 1647. 1 *Bla. Rep.* 547.]

H. 9 *G.* 2. Dr. *Walker's* case. A mandamus was directed to Dr. Richard Walker, vice-master of Trinity college in Cambridge, reciting the statutes of the college, and that thereby it was ordained, that in case the master of the said college should at any time be examined before the visitor, the bishop of Ely, and be lawfully convicted before the said visitor of dilapidation of the goods of the college, or violation of the statutes, he should

[456] without delay be deprived of the office of master by the vice-master of the said college, and that without appeal: and that a cause of office was lately depending before Thomas lord bishop of Ely, then and still visitor, at the promotion of Robert Jackson clerk, one of the fellows of the said college, against Dr. Richard Bentley master of the said college, for dilapidation of the goods of the said college, and violation of the statutes, wherein several articles were exhibited for that purpose, and that a prohibition and afterwards a consultation was awarded upon the said articles to the said bishop of Ely the visitor: and that the said bishop, having considered the evidence on both sides, did adjudge as visitor aforesaid, that the said Dr. Richard Bentley was guilty of dilapidation, and violation of the statutes, and thereby incurred the penalty of deprivation of his office; which said sentence is still in force: and that it is the duty of the said Richard Walker as vice-master, to execute the said sentence, by depriving the said Dr. Richard Bentley of his office of master; and that the said Dr. Walker, having had due notice of the sentence, and being duly required to deprive him, neglects and refuses so to do: the writ therefore commands him without delay to deprive the said Dr. Bentley of the said office of master of the said college,

or to shew cause to the contrary. Dr. Walker returns, that the statute appointing the bishop of Ely visitor is void; and that the college being of royal foundation, the king only is visitor. By lord *Hardwicke* chief justice: There are two things which seem to be aimed at by this writ and return, which I do not see that the court can do; first, to aid the jurisdiction of the bishop of Ely as visitor; secondly, to determine that the king is general visitor. But the writ in this case is *felo de se*: for it suggests that the bishop is visitor of the college; and if so, he may visit, and remove, or punish the vice-master, and we could do no more; and on the contrary, if the king be visitor, as the return suggests, you may apply to the king for him to visit. And on the last day of the term, the court quashed the writ of mandamus; but said they did not intend it should be understood, that they had thereby determined whether the king or the bishop is general visitor. *Cas. Hardwicke*, 212.

In the case of *The King* and *the Bishop of Ely*, *E.* 23 *G.* 2. This case came to be considered, whether the bishop of Ely was visitor or not; but not determined. The case was: A rule was made to shew cause why a mandamus should not go to the bishop of Ely, commanding him to hear an appeal made to him as visitor of Trinity college in Cambridge, by Dr. Edward Vernon, who has therein complained, that he has been wrongfully deprived of his senior fellowship in the college, contrary to the statutes thereof, made upon affidavits that the bishop declined hearing the appeal, until he could be satisfied that he had a right to visit the college. By *Lee* chief justice: It appears from the affidavits, that there has been an appeal to the bishop as visitor; that the bishop has declined exercising any visitatorial power, in order to take the opinion of this court whether he has any right to exercise it. This is a controverted question, and it is not at all clear to the court who is visitor; and if we had seen and read all the statutes of the college, we have no authority to determine who is visitor, that being the proper province of a jury.—And the rule was discharged. 1 *Wilson*, 266. [457]

But although the king's courts may not interfere with regard to the private statutes of the society, as established by the founder, yet as to the public laws of the land, it seemeth that they may interfere, for over these the founder could give to the visitor no exclusive jurisdiction. As in the case of *St. John's college in Cambridge*, *M.* 5 *W.* By the act of the 1 *W.* it was enacted, that if any governor, head, or fellow of any college or hall in either of the universities, should neglect or refuse to take the oaths, for six months after the first day of August then next following, such government, headship, or fellowship, should be void. Several of the fellows of that college had not taken the oaths pursuant to the statute, and thereupon a mandamus was directed

to Humphrey Gower, head of that college, setting forth the act, and that such fellows had not taken the oaths, and that they still continued in their fellowships: therefore by this writ they were commanded to remove them, or to shew cause. They return, that the college was founded by Margaret countess of Richmond; that the bishop of Ely for the time being was by her appointed visitor: and on their behalf it was objected, that a mandamus is a remedial writ; that no precedent can be produced where it hath been granted to expel persons, but always to restore them to places of which they had been deprived; and that it will not lie where there is a local and proper visitor. But
[458] by *Holt* chief justice: The visitor is made by the founder, and is the proper judge of the laws of the college; he is to determine offences against these private laws: but where the law of the land is disobeyed, (as it is in this case,) the court of king's bench will take notice thereof, notwithstanding the visitor; and the proper remedy to put the law in execution is by a mandamus. But the cause was adjourned. And in the act of the 1 *G. c.* 13. for taking the oaths in like manner, it is specially provided, that the court of king's bench by mandamus shall compel a person to be admitted into a place vacated for want of taking the oaths as aforesaid. 4 *Mod.* 233. 15 *Viner*, 202.

Also, where there is a particular trust to be executed by the college, a court of equity will interfere to carry that trust into execution. As in the case of *Green* and *Rutherforth*, May 23, 1750. The plaintiff exhibited his bill against the master, fellows, and scholars of St. John's college in Cambridge, to oblige Dr. Rutherforth to deliver up a presentation made by the college of him to the rectory and parish church of Barrow in Suffolk, to restrain his having institution and induction thereon, and to present the plaintiff under their common seal; setting forth, that Dr. John Bowton, a fellow of the said college, by his will devised to the master, fellows, and scholars of the said college, and their successors, the perpetual advowson of this rectory in trust, that whenever the church shall be void, they shall present one of his name and kindred, if there be any such capable thereof in the college; if no such, then that they present the senior divine then fellow of the college; and on his refusal, the next senior divine, and so downward: that the last incumbent dying, it was offered to the senior fellow, and on his refusal to the next, till it came to the plaintiff's turn as next senior on the divinity line, who offered to take it; but the defendant insisted, that he being doctor in divinity, was to be considered as the person described by the testator, and interposed by appeal to the bishop of Ely as visitor: on hearing which, the bishop was of opinion, that Dr. Rutherforth was within the description of the will, and therefore required them to present him. The plaintiff insisted, that as the advowson was devised to the college under particular trust by a third

person (not the founder), the visitor had not jurisdiction to determine of the presentation, or to interpose in execution of the trust; and therefore prays, that the presentation may be cancelled, and that the college may be directed to present him as intitled under the trust of the will. Dr. Rutherforth pleaded to [459] the jurisdiction of the court. By sir *John Strange* master of the rolls, and the lord chancellor *Hardwicke*: If this had been a general bequest of an advowson to the college, without any particular trust annexed, it would have fallen under the general regulations controuling all the other property of that nature, as an object of the visitatorial power; but this is circumscribed by particular, express trust, inconsistent with the regulations by which the other property is to be governed, and therefore proper for the jurisdiction of this court, standing on special circumstances peculiar to itself; which puts an end to the visitor's power over it. If it had been devised to a stranger on the same trust, there could then be no pretence to say that in such case the visitor would have had any power over it, but the college must have been obliged to apply to this court to compel the execution. And it cannot differ the case, that the college happened to be the trustees. Suppose it had been on trust to present a member of another college, the visitor of this could have no power over it; and the present case differs not in substance from that. — And the plea to the jurisdiction, as being in the visitor, was over-ruled. 1 *Vesey*, 462. (*g*)

(*g*) In general, where there is no other specific legal remedy to obtain the ends of justice, the courts of law will interfere, lest there should be a defect of justice. On this principle a mandamus was directed to the keepers of the seal of the university of Cambridge, to set the university seal to the appointment of a lord high steward. [*The King* v. *University of Cambridge*, 3 *Burr*. 1647.] 1 *Black. Rep.* 547. Also to compel the warden of Wadham college, Oxford, to affix the common seal of the college to an answer of the fellows to a bill in chancery, though contrary to his own separate answer put in [*The King* v. *Windham*,] (*Cowp*. 377.); because these cases do not come within the cognizance of a visitor. Upon which principle a mandamus was also granted to the bishop of Ely, to appoint one of two persons presented to him by the fellows of Peterhouse college in Cambridge to be master; the court being of opinion, from a view of the charters of the college, that the right which the bishop claimed of appointing to the mastership, on neglect of the fellows to elect, devolved on him, not as visitor, but by the special appointment of the founder; and therefore in this case the statutes were to be construed by the courts of law, for he could not visit himself. *Rex* v. *Bishop of Ely*, 2 *T. Rep*. 290. But if there be a visitor who can exercise jurisdiction, the appeal must be to him; and therefore a sentence of expulsion unappealed from being given in evidence on an indictment for assaulting a *fellow commoner* of Queen's college, Cambridge, by

Return of a visitor by affidavit.

T. T. 13 G. 2. *The King* and *Whaley.* A mandamus was granted, directed to the defendant as master of Peter-house

turning him out of the college garden, was held *conclusive* for the defendant. *Rex* v. *Grunden*, *Cowp.* 315. And a bill filed by a purchaser of a set of chambers in an inn of court against the benchers, relative to a renewal of the grant of the chambers, was dismissed, (*Cunningham* v. *Wegg*, 2 *Br. C. C.* 241.) the appeal being to the twelve judges, who are visitors. *Hart*'s and *Savage*'s cases, *Doug.* 353. [The publication of a pamphlet against the established religion in the university of Cambridge, is an offence within one of the statutes of the university, (*De Concionibus*,) and punishable by banishment by the vice-chancellor, assisted by the heads of colleges in his court; and though the statute inflicting that punishment adds, that the party shall be banished from his college, the court of king's bench will not admit a mandamus to restore a person to the franchises of the university, against whom only banishment from the university is pronounced in the above court. *Frend*'s case; or *The King* v. *Cambridge* (*University*), 6 *T. R.* 89.] In a private eleemosynary lay foundation, if no visitor be appointed by the founder, the right of visitation, in default of his heirs, devolves upon the king, and is to be exercised by the great seal; and on this ground it was decided, that the king is visitor of St. Catherine's Hall, Cambridge, and the king's bench refused to interfere by mandamus to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election, referring the question to the lord chancellor. 4 *T. Rep.* 233. *The King* against *the Masters and Fellows of St. Catherine's Hall.* In which case lord *Kenyon* Ch. J. observed, that corporate bodies which respect the public police of the country, and the administration of justice, are better regulated under the superintendence of the king's bench than of the court of chancery; but it is otherwise with eleemosynary foundations in general. If there be a visitor, his determination is not examinable at law; but though the court will not compel a visitor to go into the merits of a case brought before him, it will compel him, if an appeal be lodged in time, to hear the parties, and form some judgment (*Rex* v. *The Bishop of Lincoln*, 2 *T. Rep.* 338. *n.*, and *Rex* v. *Bishop of Ely*, 5 *T. Rep.* 475.); and will prohibit him, if under pretence of visitatorial authority he exceeds his jurisdiction. [*Bp. of Chichester* v. *Harward and another*,] 1 *T. Rep.* 650. [So in *The King* v. *Bishop of Worcester and others*, 4 *M. & S. Rep.* 415., the only question was, whether the defendants were visitors or not, *quoad* the subject matter. It being held that they were, a mandamus was granted to them to proceed, and determine the appeal in which they had heard the evidence, but had declined to act.] Whether commoners, and other independent members of a college, belong to the foundation so as to be entitled to the protection of the visitor, may, perhaps, depend on the statutes of the college; but in *Davison*'s case in chancery, lord *Apsley*, assisted by *De Grey*, Ch. J. C. P. and Mr. Baron *Adams*, was of opinion, that a commoner of University college in Oxford was a *mere boarder*, and therefore that his expulsion operated as a notice to quit. *Ex parte Davison*, *Cowp.* 319. And in the above-mentioned case of *The King*

college in the university of Cambridge, to admit Thomas Rogers to a fellowship of that college, upon affidavit of his election. A motion was made to supersede this writ, upon affidavits of there [461] being a visitor, namely, the bishop of Ely. But the court put the master to make a return, and refused to determine the point upon affidavits, where the other party had no opportunity to right himself by an action. *Str.* 1139.

8. *T.* 6 *G.* 2. *Bentley* against *The Bishop of Ely.* In prohibition, Dr. Bentley, the plaintiff, declared, that king Henry the eighth, on the 19th of December, in the 13th year of his reign, founded Trinity college in Cambridge, and that queen Elizabeth made a body of statutes, the fortieth whereof is entitled *De magistri si res exigat amotione;* and speaking of the bishop of Ely, there are the words *corrigat, puniat, expellat:* that he was cited to appear before the bishop as special visitor appointed by the said 40th statute of *Elizabeth,* to answer to sixty-four articles, which are insisted upon as violations of the statutes, some of which are long before the last act of grace, and others of them are for setting the college seal in conjunction with the fellows. The bishop for a consultation sets out a former statute of *Edw.* 6. in these words, *visitator episcopus Eliensis sit;* and avers that he is visitor-general, and as such had a right to proceed upon the articles. And on demurrer, after several arguments, these points were ruled:

Visitor must pursue his power, otherwise he will be prohibited.

First, that though several of the facts charged appear to be before the act of grace; yet they are not pardoned by the statute, but they are still inquirable by the visitor. There are two sorts of corporations; one for public government, the other for private charities. The former of these are governed by the common law; but the latter is the creature of the founder, and governed [462] by his private laws. Not that the particular persons are exempted from the common law, but the body in general is; and as these are private laws, they are in the nature of trusts, and the breach of them is no crime cognizable by the common law. The king's power of pardoning ariseth from his having the executive power in him; and though in this case the king is founder, yet

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and *the Bishop of Ely,* the court of K. B. was of opinion, that Mr. Longmire, who had been a fellow of Peterhouse, Cambridge, and had vacated his fellowship by taking a college living, but had continued his name on the college boards, was not entitled to any preference in the election of a master, as being a member of the *domus* or foundation, under these words: "Ipsius domus atque sociorum ejusdem semper ratio habeatur, ut hi, si qui inter eos ad hoc munus obeundum inveniantur idonei, ceteris preferantur; sin hujusmodi in domo nulli extiterint, tum aliunde assumantur." [A mandamus will not lie to turn out a fellow of a college. *Dr. Gower's* case, 3 *Salk.* 250.]

the breach of his private statutes are not crimes against the crown. The crimes pardoned are such as are against the public laws and statutes of the realm; whereas these are in the nature of domestic rules for the better ordering of a private family.

Secondly, that though several of the crimes imputed to him, for violations of the statutes of the college, appear to have been done by him in conjunction with others; yet that is no reason to exclude the inquiry of the visitor. If a whole body join together in doing an unlawful act, they are severally punishable in their natural capacity.

Thirdly, that by the statute of *Edw.* 6. the bishop of Ely and his successors were appointed general visitors; it being *Episcopus Eliensis*, without any christian name, which shall extend to the bishop and his successors, without the words *for the time being*.

Fourthly, that though the three former determinations are in favour of the suit below, yet the prohibition ought to stand; because the bishop hath not cited the doctor upon the foot of his general visitatorial power, but as a special visitor appointed by the 40th statute of *Eliz.*, which the court said he was not. For being before appointed general visitor, there remained no further power in the crown, with regard to enlarging the visitatorial power. They said it was a question they would not determine, whether when the crown has given statutes and appointed a visitor, the successor can any way alter or annul the former statutes: the practice, indeed, has been otherwise; but it hath never been determined to be good. For this last reason, they were all of opinion, that the prohibition ought to stand.

Note: Upon a writ of error in parliament, this judgment was reversed: and the lords went into the consideration of the several articles; and as to some granted a prohibition, and as to others a consultation. *Str.* 912.

Case where a person to be visited happens to be also visitor.

*[463]

9. *E.* 1 *Geo.* 2. *K.* and *The Bishop of Chester*. Mandamus directed to the bishop as warden of Manchester * college, to admit a chaplain. The bishop returns, that, by the royal foundation, he is appointed visitor. And upon argument it was objected, that though a mandamus will not lie where there is a visitor free from any objection, yet here the two offices being in the same person, he cannot visit himself; and no case can be shewn, where the founder hath once granted the whole out of him, and on such a temporary suspension it hath resulted back. And by the court; It is plain he cannot visit now, because his power is suspended; and these are powers that may cease, and revive, without inconvenience; since there is this court to resort to. In a lay corporation, the founder and his heirs are visitors; in a spiritual corporation, the jurisdiction is here, unless there be an express visitor appointed: the ground of our interposing in this case is,

that at present there is no other visitatorial power in being. And a peremptory mandamus was granted. *Str.* 797. (*h*)

Afterwards, an act of parliament was made, 2 *G.* 2. *c.* 29. impowering the king to visit the collegiate church of Manchester, during such time as the wardenship of the said church is or shall be held in commendam with the bishopric of Chester.

10. *H.* 30 *G.* 2. *The Master and Senior Fellows of St. John's College in Cambridge* against *The Reverend Thomas Todington, clerk.* It was moved in behalf of the master and senior fellows of the said college for a prohibition, to prohibit the bishop of Ely from proceeding as supposed visitor of the said college, on an appeal promoted by the said Mr. Todington for their not electing him fellow.

Where it is disputed whether a person is visitor or not, the king's courts are to determine the case.

The suggestion stated, that the bishop of Ely for the time being is not visitor of the said college, as to elections into fellowships, or other offices, in the said college, nor hath any visitatorial power or jurisdiction whatsoever over the master and fellows of the said college, or any of them, in that respect:

That by an indenture tripartite, made the 27th day of October, in the 22d year of the reign of king Henry the eighth, between [464]
sir Anthony Fitzherbert, knight, then one of the king's justices of his common pleas, and John Keton, doctor in divinity, and canon of the cathedral church of Salisbury, on one part; the chapter of Southwell, on the second part; and the then master, fellows, and scholars of the college of St. John aforesaid, on the third part: it was covenanted and agreed between the said parties, for them, their heirs and successors for ever, in form following; that is to say,

That the said master, fellows, and scholars of St. John's aforesaid, had granted for them and their successors for ever, unto the said Dr. Keton, that he for himself, at the nomination and appointment as thereafter should be expressed, should have two fellows and two scholars founded and sustained at the costs only of the said master, fellows, and scholars, within the college of St. John aforesaid, there to continue for ever of his foundation, over and above other fellows and scholars there founded or thereafter to be founded by the foundress of the said college, or any other person that then had given, or thereafter should give, lands or goods to such purpose or intent:

That the said master, fellows, and scholars of the said college, thereby covenanted and granted unto the said sir Anthony Fitz-

(*h*) Per *Buller* J. 'A visitor cannot be a judge in his own cause unless that power be expressly given him. A founder, indeed, may make him so, but such an authority is not to be implied; he cannot visit himself.' 2 *T. Rep.* 318. This doctrine is also recognized in the preamble to the 2 *G.* 2. *c.* 29.

herbert, Dr. Keton, and to the said chapter, and to their heirs and successors, that the said fellows and scholars of the foundation of the said Dr. Keton should have and enjoy all manner of profits, as well meat, drink, and wages, as all other commodities, easements, and liberties, like and in as large manner as other fellows and scholars of the same college (by the foundress's foundation of the same college) then had, or in time then coming should have, in any manner or wise, at the proper costs and charges of the same master, fellows, and scholars of the college of St. John aforesaid, and their successors for ever:

That the same master, fellows, and scholars, by the said indenture, covenanted and granted unto the said sir Anthony Fitzherbert, Dr. Keton, and chapter of Southwell, and to their heirs and successors, that the same two fellows of the foundation of the said Dr. Keton should receive of the said master, fellows, and scholars, and their successors, every year, 1*l.* 6*s.* 8*d.* over and above the wages limited to other fellows of the foundress's foundation; that is to say, to either of them 13*s.* 4*d.* at the feasts of Easter and St. Michael yearly, by even portions:

[465] That the said master, fellows, and scholars thereby covenanted and granted, for them and their successors, unto the said sir Anthony Fitzherbert and Dr. Keton, and the longer liver of them, that they from thenceforth should have the nomination and election of the said fellows and scholars during their lives natural; and after the decease of the said sir Anthony and Dr. Keton, then the said fellows and scholars should be at the nomination and election of the said master, fellows, and scholars of the college of St. John aforesaid, and of their successors for ever, after and according to such ordinance and writing as the said Dr. Keton should thereof make and declare by his last will or otherwise.

Provided always, that the said fellows and scholars should be elected and chosen of those persons that be or had been choristers of the chapter of Southwell aforesaid, if any such able persons in manners and learning could be found in Southwell aforesaid; and in default of such persons there, then of such persons as had been choristers of the said chapter of Southwell, which persons should be then inhabitant or abiding in the said university of Cambridge: and if none such should be found able in the university aforesaid, then the same fellows and scholars to be elected and chosen of such persons as should be most singular in manners and learning, of what country soever they should be, that should be then abiding in the same university:

That the said master, fellows, and scholars covenanted and granted by the said indenture unto the said sir Anthony Fitzherbert and Dr. Keton, and to the said chapter, their heirs and successors, that when the said two fellowships and scholarships,

or any of them, should be vacant, then immediately at the then next time of election of fellows or scholars of the said college, limited by the statutes of the college of St. John aforesaid, other fellow or fellows, scholar or scholars, as the case should require, should be elected, named, and chosen by the said master, fellows, and scholars, according to these covenants and agreements, and according to such ordinances or will as the said Dr. Keton should thereof make and declare:

That it was covenanted and agreed by the said indenture, that the said master, fellows, and scholars of St. John aforesaid, and also the fellows and scholars of the foundation of the said Dr. Keton, at the time of their admission, should be sworn to observe and keep the statutes and ordinances that then were made, or thereafter should be made, by the said Dr. Keton, for the foundation of the said fellows and scholars; so that the said statutes should be conformable with the statutes of the foundress of the said college: [466]

For the which all and singular the premises well and truly to be observed and kept by the said master, fellows, and scholars, and their successors, in manner and form as is aforesaid, that is to say, as well for the elections and admissions of the said fellows and scholars, and for their finding, and for wages yearly to be paid to the same, with all other liberties, commodities, and profits likewise pertaining unto them, as for all other covenants and agreements, with all and singular the premises, according to the ordinance above rehearsed: the said Dr. Keton had contented, given, and paid, to the said master, fellows, and scholars, in money, plate, and jewels, to the value of 400*l.*:

That it was covenanted and agreed by the said indenture between the said parties for them and their successors, that if the said master, fellows, and scholars, and their successors, should fail in taking, admitting, or receiving of the said fellows and scholars, in any time of election next after the avoidance, and they should not be chosen nor admitted into the said college according to the ordinances and agreements above rehearsed, or should not have and enjoy their full commodities and profits as is aforesaid; that then the aforesaid master, fellows, and scholars, and their successors, should forfeit, as well to the said sir Anthony Fitzherbert and Dr. Keton, as to the chapter of Southwell, and to their heirs and successors, in the name of a penalty or pain, for every default made, or no due election of the said fellows and scholars, or any of them, 20*s.* for every month that it should happen the said fellows and scholars not to be chosen nor admitted into the said college as is aforesaid, or restrained of any profits, commodities, or easements as is aforesaid; and that then it should be lawful, as well to the said sir Anthony Fitzherbert and Dr. Keton for their part, as to the said chapter of

Southwell, and their heirs and successors, for their part, into the manors of Marslete and Myllington, in the county of York, and into the manor of Little Markham, in the county of Nottingham, to enter and distrain for the same 20s. and the arrears of the same, for every time or times of forfeiture; and the distress to withhold until the said 20s. with the arrearages of the same, should be to them well and truly satisfied, contented, and paid:

[467] That the said Dr. Keton did not at any time, by his last will, or otherwise, make or declare any statute or ordinance, other than what was contained in the said above-recited indenture, of or concerning the said fellowships called Southwell fellowships, or of or concerning either of them:

The suggestion also stated, that an appeal had been made to the bishop, as visitor of the college, by the said Thomas Todington, complaining that the said master and senior fellows had unduly elected William Craven, clerk, into one of the Southwell fellowships founded by the said Dr. Keton, and had refused to elect him into the said fellowship, notwithstanding he had been a chorister of Southwell, and was otherwise duly qualified according to the indenture of foundation; and that they had been served with the bishop's citation and process upon the said appeal; and therefore they prayed a prohibition.

Upon shewing cause, the statutes given to the college in the time of queen Elizabeth, and by which the college hath ever since been governed, were laid before the court; and also Dr. Keton's indenture.

During the argument, the counsel for the college having insisted much upon their being permitted to declare in prohibition; the court, for saving expence to the parties, and in order that the matter might be fully heard and yet determined in a summary way upon motion, directed that bishop Fisher's statutes, by which the college was governed before the making the statutes of Elizabeth, should also be laid before the court; as these statutes might give some light to the construction of Dr. Keton's indenture, which was made during the time these statutes were in force; which was done accordingly: so that this case should be determined upon the whole of the evidence which either party could lay before the court.

The counsel who shewed cause against the prohibition, made three questions: 1. Whether the bishop is general visitor of the college, as to the election of fellows. 2. Whether there is any thing in this particular fellowship, which will exempt it from his visitation; as it is an ingrafted or annexed foundation. 3. Whether the power of distress is not the only remedy; or, in other words, whether (notwithstanding) the bishop's power doth not still subsist.

As to the first; they argued, that the college was founded in

the second year of Hen. 8. from a priory collegiate, belonging to the bishop of Ely; of which the bishop was visitor: By law (by *Holt* chief justice) he is so; therefore he did still remain so. The bishop of Ely was visitor under Dr. Fisher's statutes; and the said Dr. Fisher reserved a power of altering, interpreting, or giving new statutes; yet the power of coercion is wholly left to the bishop of Ely, and he has the whole executive power in him. The statute *de Visitatore* makes him visitor: *Episcopo Eliensi commendamus.* No set form of words is necessary to appoint a visitor. And if he is visitor, all other powers are incident to his office. And the words of the said statute shew the extent of his authority, when he visits *ex officio.* And no objection can arise upon it, but he may visit. There is a clause in one of the statutes of Elizabeth, which fixes the expence of his visitation; which shews, that he was before in possession of this power. When Dr. Keton's foundation was made, the college was governed by Fisher's statutes. Dr. Keton reserved a power to himself to make statutes touching his own fellows: he made none; if he had, they were to be conformable to the statutes of the college: as he made none, and his fellows were by the indenture to be paid out of the revenue of the college, and were to have the same power and right as foundation fellows, and were to obey the same statutes; by this means Dr. Keton made them subject to the same statutes and the same visitor. Dr. Keton reserved no power to his heirs to give statutes. By the indenture, the right of election is given to the master, fellows, and scholars; but Dr. Keton's fellows usually have been, as the rest are, elected by the master and fellows only. The statutes of Elizabeth are still more plain: they recognize him by name to be visitor: he is expressly so appointed: the power must be somewhere; and nobody else ever claimed it: the exercise of it is an evidence of the right, and implies a grant of it. For which purpose was cited the case of Dr. *Martin* against *The Archbishop of Canterbury* as visitor of Merton college in Oxford, *T.* 11 & 12 G. 2. (1) This was the case of a private fellowship: It was contended by Dr. Martin, that the bishop of Winchester was visitor: the other side showed, that the archbishop had exercised this power, but the bishop of Winchester never had. An objection was taken, that as the case was doubtful, a prohibition was proper: By the court, the long usage will not give a right, yet it is a strong evidence of it; and a prohibition was denied.

Upon the second question, it was argued that different visitors [469]
of different foundations, would be productive of great confusion and perpetual disputes: that half of the fellows of the

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(1) *Andrews' Rep.* 258.

college are ingrafted, yet all take the same oath, and are all to be governed by queen Elizabeth's statutes; there is no exemption in those statutes; and Dr. Keton's foundation was made long before; and they all swear to obey the statutes of Elizabeth.

As to the third question; by the indenture the college agree, these fellows shall have the same rights as foundation fellows had: an appeal to the visitor was one of those rights; and the law has great respect to rights: the penalty or forfeiture does not lessen the right; they were two independent things: it is inadequate; it cannot take away the antecedent right of a third person: the candidate has one right, and the bishop another, and the chapter of Southwell another: the two first are remedial; the last is a right to punish: the penalty gives no relief to the candidate: but if it did, where a party hath several remedies, he may take which he pleases. Distress was originally applicable to rent; yet if it was recovered by action, the rent notwithstanding must be paid; though a penalty be given, yet the specific remedy is not lost.

In support of the rule for a prohibition, it was argued; the power of a visitor is arbitrary, and yet conclusive in the first instance. All fundatory rights arise from the property of the donor. A founder has the nomination of his visitor; and unless he dispose of this power, it remains to his heirs; and if he die without heirs, it goes to the crown. It is settled, that a founder, or his heirs (if he does it not), may make a visitor; may give him partial, or general powers: if partial ones, and he exceeds them, that excess becomes a nullity, and lets in the law; and this court, whether they can give relief or not, will see that these jurisdictions keep within their bounds, and will grant a prohibition where there is such excess of power, as well as where there is no power at all.

If Dr. Keton made no visitor, the power remains in his heir; and if no heir, it is in the crown. Where there is a probability of doubt, whether the party to be prohibited is doing right or not, the court always gives him liberty to declare in prohibition, otherwise the party would be without remedy.

2 *P. Will.* 325. was cited to show, that a visitatorial power is not by implication to be inferred. It must depend upon a direct appointment.

[470] The arguments drawn from the word *visitor* are not conclusive.—For the word is not used with any designation of the power. A man may make an executor, to execute one part of his will; and another executor for another part. So a visitor for a particular purpose cannot (because he is so) be a general visitor.

We admit the bishop visitor for some purposes, but not a general visitor. He is limited by the statutes in the time, the objects, the manner, and form of his visitation.

It is objected, that the words *sit visitator*, in Dr. *Bentley*'s case, were held sufficient to make the bishop of Ely general visitor. But that was not the ground of the judgment. Lord *Raymond* considered in that case what the crown had in view; that they meant to make a general visitor over all persons and all things: there was no reservation in the crown to make new statutes, as there is in this case; and the great doubt was, whether the crown should take the right vested in the bishop out of him; and if queen Elizabeth's statutes had not been accepted, the crown should not have resumed that power.

The power given by the statutes of this college to the vice-chancellor in certain cases, and to the masters of Trinity, King's, and Christ's colleges, are inconsistent with a general visitor. Queen Elizabeth reserves to herself the power of giving new, and of interpreting these statutes; and interdicts therein the bishop or vice-chancellor. By the statutes the bishop must be called in: and he is limited within fifteen days. A single person cannot call him to visit. Dr. Keton's foundation being antecedent to queen Elizabeth's statutes, and bishop Fisher's statutes being those which the college was governed by at that time; queen Elizabeth could not make his foundation subject to the bishop of Ely's visitatorial power. Trinity-hall hath the same statutes as Caius college; and yet they have not the same visitor.

The case of *Green* and *Rutherforth* is here not applicable. That was a mere trust; and therefore the bishop could have nothing to do with it. Lord *Hardwicke* could only determine upon the statutes in the defendant's plea. But all the statutes being now before the court; and there appearing powers and provisions made by them, inconsistent with the bishop's power as general visitor; this court will determine otherwise.

The *nomine pœnæ* is a common law-right; and the visitor hath nothing to do with it. A specific remedy is provided, and to be had elsewhere, and not from the bishop of Ely. By the indenture, the power of distress is given to Dr. Keton, Fitzherbert, and the chapter of Southwell, their heirs and successors. [471] The remedy is not inadequate; for, if followed, it will come to the same thing. The chapter of Southwell are only trustees for Todington; and if he is injured, he may in equity, shewing his proprietary right, compel them to distrain; and if he does, the college must ultimately come here; and the right being determined at law for him, the court will grant a mandamus to admit him to the fellowship. And this is the ground, why the

prohibition should go; because this court will not suffer the power of a visitor to be exercised wrongfully.

By lord *Mansfield* chief justice:

I was very desirous to see if any further light could be had in this case, from the ancient constitution of the college; and therefore directed that bishop Fisher's statutes should be looked into, and laid before the court.

It was insisted upon in the first argument, that the court should at least give the plaintiff leave to declare in prohibition; that this matter might receive a more solemn determination. But I own I had strong objections to it then; and I will now say a few things upon that head, before I come to the merits of this case.

When the court inclines to grant a motion for a prohibition, there the defendant has a sort of right to insist, that the plaintiff shall declare in prohibition. But where the opinion of the court is against granting a prohibition, the plaintiff has no such right to insist upon declaring in prohibition. We cannot compel the plaintiff in prohibition to declare; but the statute of 8 & 9 *W.* c. 11. makes him liable to costs; nor can we, for the same reason, compel the defendant to defend against his will.

Only consider what would be the consequence in such a case as this, if the court was to permit the plaintiff to declare. It would have many bad consequences. A fellowship is a temporary support; and sometimes is limited to a certain number of years. Is the promoter (or fellow) to take upon himself the expence of such a suit, which may go through all the forms of law, even to a writ of error, only because the plaintiff asks it? Or is the visitor to do it? If neither of them will do it, the consequence will be, that every college shall do as they please, and may do this even in a case where the authority of a visitor is well founded.

Having said thus much in a case where the court is against
[472] the prohibition, I must add, that it is much better and more convenient to all parties, to have this matter determined in a summary way.

I come now to the merits of the question. I must own I am confirmed in the same opinion I was of, when this matter was first stated to the court.

There are two general questions:

1. Whether the bishop of Ely is visitor of this college, as to the election of fellows; for that is the point which is put and insisted upon in the suggestion; and the master and senior fellows only complain.

2. Suppose the bishop is such a visitor, and may visit the fellows upon the old foundation; yet whether he may exercise

that power upon Dr. Keton's fellowships, which are ingrafted fellowships.

I will make here some observations, and lay down some general rules, concerning this power of a visitor.

This power, though a summary one, is certainly very convenient for these learned bodies. It has often been so considered by themselves. It is called *forum domesticum*. The exercise of it is in no case more convenient than in that of elections. When the qualifications and proprieties of candidates are to be determined; what confusion would be made, if these were to be determined at the common law, and the party who had the right were yet kept out of the profits in the meantime!

But be this power convenient or not; we must take it as it is established by law.

When there is a visitor, he is so without appeal; as it was adjudged in the case of *Philips* and *Bury*.

Having premised this, I will mention some of the rules concerning this power.

The law considers these foundations in two lights: First, as they are corporations; and in this respect they are creatures of the crown's charter, governed by the law of the land. Secondly, as they are eleemosynary; and in this respect they are creatures of the founder's bounty, and subject to the power of visitation.

The founder may delegate his visitatorial power; either generally, or specially. He may do this either by general words, or he may prescribe a mode for the exercise of any part of this power. But if a mode of visitation is prescribed in any particular case, that will not take away the general powers incidental to the office of a visitor; of which power that of determining concerning elections hath been held to be one. *Sit visitator* has been held a sufficient appointment, and to give all powers incidental to the office. No set form of words is necessary. You must look into the whole tenor of the statutes, to see whether the power be given, or intended to be given. [473]

When the statutes in question were made, visitatorial power was not so well understood as it has been since, and is at this day.

A founder may split this power into a number of statutes for particular cases, and yet the court may consider upon the whole who is general visitor.

In the case of Clare Hall in Cambridge, *Attorney-general* against *Talbot*, *H.* 1747. Lord *Hardwicke* argued, that there was a general visitor. One of the statutes directed, that the chancellor of the university should visit yearly, if any thing wanted to be corrected. A second statute gave him power to interpret the statutes. A third statute reserved to the countess

of Clare a power to give new statutes, but expressly excluded her heir from doing so; and there were no general words appointing the chancellor to be visitor. But as the heir was expressly excluded from giving new statutes, and the chancellor of the university had power to interpret and to visit, although not expressly appointed visitor; yet lord *Hardwicke* held he was a general visitor.

I take this to be clear, that a founder may appoint a visitor with general power; and yet except particular powers in particular cases.

These being the general rules relating to visitatorial power, I will now consider this case upon the statutes themselves.

The present constitution of the college must be taken as it stands upon the statutes of Elizabeth. The old statutes or old constitution are no otherwise material, than as they may serve to give light to the new ones, which refer to them. As in the construction of an act of parliament, an old statute may give light to the construction of a new one.

The question is, whether upon these statutes the bishop is general visitor of the college, except in special cases provided [473] for in the statutes.

In case where a body of statutes is given by a founder, I doubt whether a visitor can give or make new statutes, unless power is given him for that purpose.

Where there are no statutes to prohibit him, there are cases wherein injunctions have been given by a visitor. I observe this, because upon these statutes I observe a jealousy in the [474] founder, that the right of giving statutes might not be taken from the crown (the heir of the founder.)

The bishop was to be visitor, not legislator. He was to give no new statutes. By the statutes the legislative power is preserved to the crown.

It hath been held (in Dr. *Bentley*'s case), that where a body of statutes hath been already given, the crown (though the founder) cannot alter them without the consent of the college.

Here the power of making statutes is expressly reserved to the crown, and is particularly guarded. And if the bishop acts contrary to the statutes, he acts contrary to his authority.

The provision made in chap. 46. *De modo procedendi contra magistrum*, wherein the vice-chancellor, the masters of Trinity, Christ's, and King's colleges, are to interpose, amounts to an exception of the general visitatorial power, in that particular case. So in other particular cases. But the question is, whether all the rest of the visitatorial power is not in the bishop.

This depends upon three statutes; chap. 2. *De electione magistri*. Chap. 50. *De ambiguis*. And chap. 51. *De visitatore*. It is observable, that chap. 2. refers to the bishop as

the known visitor of the college, and by words which make him a visitor—*ad collegii visitatorem veniatur*: and though this statute doth not describe him by name as visitor, yet the statutes treat him as well known to be the general visitor.

By chap. 50. *De ambiguis*, express authorities are given to the bishop as visitor, to determine, interpret, and declare upon the statutes. This is as large a power as any visitor can have; he is not to make new statutes, for that is contrary to his power. The words in this statute, *visitationem autem hujus collegii episcopo Eliensi commendamus*, are most strong words to make him a general visitor.

Chap. 51. *De visitatore*, gives him a power to visit *ex officio; cæteraque omnia et singula facere et exercere*, according to the said statute.

In *Talbot's* case, the visitor was to visit *de anno in annum;* yet he was held to be a general visitor.

In the case of *Exeter college, de quinquennio in quinquennium;* yet held to be a general visitor. Such a limitation of time is not material. If he is visitor, he has a right to hear complaints at any time: this is incidental to his visitatorial power.

This being so, I am the more confirmed in my opinion of [475] these statutes (if nothing arises upon bishop Fisher's statutes to the contrary), from the case of *Green* and *Rutherforth*. The first question in that case was, whether it did appear that the bishop of Ely was general visitor of this college. These three statutes, namely, chap. 2. 50, and 51., were then pleaded to the jurisdiction of the court. Lord *Hardwicke* was of opinion, that the bishop of Ely was general visitor. The only thing which he had any doubt upon was, the injunction upon the master not to obey the bishop, if he acted contrary to the statutes. But this he said was an exception whenever such a case arises; as in the case of *Manchester college:* and when such a case happens, the jurisdiction will devolve upon the king's courts.

I think the old statutes and constitution of the college confirm this opinion. They are as strong to make the bishop general visitor; except in cases excepted.

The statute *De ambiguis* is in both. So is the statute *De visitatore:* but the words at the end of this statute, *præter hunc visitationis modum nos alium nullum Eliensi episcopo concedimus*, are left out of queen Elizabeth's statutes. This seems to have been done purposely to avoid doubt. Upon the construction of these words, as they stand in the old statutes, I think they cannot bear the sense which has been contended for; that is, that the bishop shall be visitor in the special form prescribed by the statutes, or that they shall only extend to his visitation as ordinary. The countess of Richmond was jealous that the bishops of Ely might claim to be founders; she is anxious lest the bishop should give

new statutes, or set up any right to change the old ones; and therefore she directs he shall have no greater power than he had in other colleges where he was not founder.

To visit as ordinary, and to visit an eleemosynary foundation, are different things; and yet the bishops of Ely in Cambridge, and the bishops of Lincoln in Oxford, had more visitorships, because they were diocesans.

It has been objected, that this is a proceeding to deprivation; and therefore by the statute *De visitatore* the bishop cannot visit, unless he is called in by the master and five of the senior fellows. But this is not a case of deprivation. The bishop has power over all the members of the college. He is only to consider, whether the party is a member of the college or not, duly elected or not. This is a question upon a power which has always been held incidental to the visitatorial power.

[476] It has never been doubted in the college, but the bishop was the visitor of the fellows upon the old foundation. My reason for thinking so is, that nothing has been said at the bar to the contrary. And a case has been cited of an ingrafted fellowship, wherein an appeal was made to the bishop. *Peg* and *Burton*, in 1726.

This brings me to the second question, whether ingrafted fellowships are subject to the review and sentence of the visitor? This draws on a question of the greatest consequence to all the colleges in both universities. One cannot see the tenth part of the mischief which would arise to the college, if they should succeed in this point; and there is no college which would not be involved in it. In this college there are 32 original fellowships, and 27 upon annexed foundations.

I wanted to know whether the form of conveyances of this kind, before the time of queen Elizabeth, was not by an indenture with a clause of distress, as this of Dr. Keton's; and my reason was, because I suspected it took its original form, in analogy to tenure by divine service not performed. (*Litt.* sect. 137.) If the service be certain, the donee had a power of distress by the common law; but if the service was uncertain, he had no remedy but to complain to the visitor.

Such indentures as this have been made in many cases. I have taken the pains to inquire and be informed of all the old colleges both in Cambridge and Oxford; and find there are none, but where there are some ingrafted fellowships made by indenture as this is. And there never was an instance, where fellowships are ingrafted, that they were not as all the other fellows of the college, unless particular terms were given, and unless a special foundation was made, and a special acceptance of it. When this is not done, they are considered as fellows of the body at large.

In the case of *University college*, *T.* 1740. Upon an appeal to the lord chancellor Hardwicke: This college was founded by king Alfred: William of Durham founded two fellowships, and required that they should be chosen *de proximis Dunelmiæ partibus oriundis*. This came before the chancellor upon an appeal, on a suggestion that the crown in right of the founder was visitor; William of Durham having appointed no special visitor of his fellows. The objection was, the fellows were not to be chosen from the county of Durham, but out of one of the next adjoining counties. The case was determined against the college, that the crown was general visitor. William of Durham having given no special visitor, these ingrafted fellows are *eo nomine* to be considered as fellows of the college. [477]

The mode of donation is the law of it. If Dr. Keton had appointed a visitor, and the college had accepted his donation upon those terms, his visitor would take place; but upon no other terms.

Dr. Keton directs his fellows to be fellows of St. John's college, but upon his foundation: and he contracts that they shall have the same privileges and rights as foundation fellows in the college: and they are so to all intents and purposes, save the proprietary right: they are to be elected as the other fellows of the college: and Dr. Keton says nothing of their manner of voting, their age, or other qualifications; but these are left to be determined by the old constitution of the college; and by that old constitution, the master and fellows are to elect; and if they do wrong, the visitor is the judge: nay, further, they are to swear to observe the statutes of the college, which then were, or then after should be made: that is, to observe these statutes; for Dr. Keton gave none himself. Had Dr. Keton made any statutes contrary to those of the college; his fellows must have obeyed the statutes of the college; had he appointed a visitor, it would have been contrary to the statutes of the college. If there had not been a word more in the deed, than making them fellows; *eo nomine* they would have become fellows of the body, and as such subject to all the statutes of the college.

This way of reasoning is not new: for my lord *Hardwicke*, in the case of *The Attorney-general* against *Talbot*, said that the party was concluded by his own information, from saying he was not a member of the college, and as such subject to the power of the visitor. So here, they are members of the college, equal in power and every thing else with the fellows on the foundation. And his lordship, in *Green* and *Rutherforth*, held the same; and said it would be the same as to all new donations.

And Sir *John Strange* (who assisted the chancellor) was of opinion in that case, that new ingraftments, unless particular

provision was made to the contrary, are *eo nomine* part of the old foundation.

An objection has been taken here upon the power of distress. This objection would extend to a great many cases besides the present. Several foundations have been made by indenture, in the same manner as this is. Dr. Fisher's foundation in this

[478] college was made so. And the precedent being once settled, it is not wonderful it should be followed. They are provisions *diverso intuitu*. This specific, by the power of the visitor, is left to the college. The distress, like the case of tenure by divine service, is left to the common law. The distress is an inadequate remedy, the value of money between that time and this considered; and it is not given to the person injured, but to Dr. Keton's heirs, and the chapter of Southwell.

The bishop of Ely has a right, with respect to the proprietary qualification, to judge of the election of fellows. And for these reasons, I am very clearly of opinion, there is no ground for a prohibition in this case. Were this matter to be determined upon the second question made, it would introduce the greatest inconvenience and confusion amongst all colleges.

If I had doubted, or had inclined that a prohibition should go, I would have given the plaintiff leave to have declared in prohibition. But as I have no doubt, I think I ought not to put the promoter of the appeal to the expence of it; both out of justice to the party, and also for the sake of the precedent.

The justices *Denison* and *Foster* were of the same opinion, Mr. Justice Wilmot being absent. M.S.

The archbishop's general power of visitation.

II. In the thirteenth year of king Henry the fourth, happened the famous cause between *the archbishop of Canterbury*, and *the chancellor and proctors of the university of Oxford*; which was thus: Archbishop Arundel being in his visitation of the diocese of Lincoln, came in his way to visit the university of Oxford, which was then within the limits of that diocese. The university insisted upon their exemption by papal authority; and refused to submit to his visitation. The archbishop urged a sentence given against them in this same cause by king Richard the second; but in vain. They stood upon their exemption, and referred themselves (in which the archbishop also agreed with them) to the king's judgment. Their cause was accordingly heard before the said king Henry the fourth, and sentence given for the archbishop and his visitatorial power over them. And this whole process and sentence, at the archbishop's petition, was ratified and inrolled in parliament, to prevent any future disputes upon that subject. *Rot. Parl.* 13, *H.* 4. *num.* 15. *Wake's State of the Ch.* 348.

Upon this, the archbishop of York put in his claim for the exception of the college called Queen hall in the said university; the result of which was this; that the archbishop of Canterbury.

in presence of the king and of the lords in the said parliament, promised, that if the archbishop of York could sufficiently shew any privilege or specialty of record, wherefore the said archbishop of Canterbury might not use or exercise his visitation of the said college, he would then abstain; saving to him always the visitation of the scholars abiding in the said college, according to the judgments and decrees made and given by the said king Richard the second, and the said king Henry the fourth. *Rot. Parl.* 13 *H.* 4. *num.* 15. *Wake's State of the Ch.* 348.

But this claim of the archbishop of York seemeth to have been frivolous; seeing the exclusive right which he insisted on, was only in respect of his being local visitor of that college: for if the archbishop of Canterbury had otherwise a power of visiting, the founder of the college could not take it from him by his statutes.

Afterwards, in the 12th year of king Charles the first, this matter was again contested by both the universities against archbishop Laud, who claimed a right of visiting them *jure metropolitico*: and they pleaded, that the power of visiting them was in the king alone, as their founder. This cause also came to an hearing before his majesty in council.

For the archbishop it was urged, that his power of visitation within his province is of common right, and as ancient as the archbishopric itself: that it is a general power, and not over certain particular persons, but over clergy and people, in all causes ecclesiastical, and in all places within his province, without exception: that if the universities have any exemption, it is incumbent upon them to shew it: that the exemptions (if any) which they had by any bulls from the pope, were abolished by the act of parliament of 28 *H.* 8. *c.* 16., and not pleadable in any court: that this power of the archbishop doth no way trench upon the king's power; but that the king by himself or his commissioners may visit as founder, and the archbishop nevertheless as metropolitan: that the archbishop's intention is not to visit the statutes of the university, or of any particular college; but to visit metropolitically; that is, to visit the body of the university, and every scholar therein, for his obedience to the doctrine and discipline of the church of England, but not to meddle with the statutes of colleges or of the university, or the particular visitors of any college.

For the university of Cambridge it was urged, that the power of visiting them of right belongeth to the king; which is an exemption from any ordinary jurisdiction: and for other exemptions, they had bulls from the pope, and charters: that [480] about the beginning of the reign of king Richard the second, most of their charters were burned, by an insurrection in the town; but many of them were confirmed in the time of Hen. 6.

rents, or other hereditaments, to such colleges or schools; it is enacted, that it shall be lawful for the king, when and as often as he shall think fit, to grant to any person or persons, bodies politic or corporate, their heirs and successors, licence to aliene in mortmain, and also to purchase, take, and hold in mortmain, in perpetuity or otherwise, any lands, tenements, or hereditaments whatsoever, of whomsoever the same shall be holden.

And by the 9 G. 2. *c.* 36., which restraineth alienations in mortmain, it is provided, that the same shall not extend to make void the dispositions of any lands, tenements, or hereditaments, which shall be made in other manner and form than in this act is directed, to or in trust for either of the two universities, or any of the colleges or houses of learning within the same; or to or in trust for the colleges of Eton, Winchester, or Westminster, for better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester, and Westminster. Provided, that no such college or house of learning, which shall hold or enjoy so many advowsons of ecclesiastical benefices as shall be equal in number to one moiety of the fellows or persons usually styled or reputed as fellows, or where there are no fellows or persons usually styled or reputed as fellows, to one moiety of the students upon the foundation, shall be capable of purchasing, taking, or holding any other advowsons of ecclesi-
[483] astical benefices by any means whatsoever; the advowsons of such ecclesiastical benefices as are annexed to, or given for the benefit or better support of the heads of any of the said colleges or houses of learning, not being computed in the number of advowsons hereby limited. (*i*)

College leases.

13. By the 13 *Eliz. c.* 10. All college leases, other than for the term of twenty-one years or three lives, shall be void. Provided, that this shall not extend to make good any lease for more years than are limited by the private statutes of the college.

By the 18 *Eliz. c.* 6. In all college leases one-third part of the rent shall be reserved and paid in corn.

And there are divers other regulations concerning the same by the said acts and by several other acts of parliament, which falling in with the general law concerning leases made by corporations whether sole or aggregate, the whole is treated of together under the title **Leases**, 6.

Commissions of pious uses.

14. By the 43 *Eliz. c.* 4., which enacteth, that whereas divers lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, have been assigned by divers well disposed persons, as well for the maintenance of schools of learning, free schools, and scholars in the universities,

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(*i*) The restriction contained in this act, so far as it relates to the colleges or houses of learning within the two universities of Oxford and Cambridge, is repealed by 45 *G.* 3. *c.* 101. [See *ante*, **Advowson.**]

as for other pious and godly purposes; which, nevertheless, have not been employed according to the charitable intent of the donors, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same; in such case, the lord chancellor may issue commissions to inquire thereof, and to take order therein: — it is provided, that nothing therein shall extend to any lands, tenements, rents, annuities, profits, goods, chattels, money, or stocks of money, given, limited, appointed, or assigned, to any college, hall, or house of learning, within the universities of Oxford or Cambridge, or to the colleges of Westminster, Eton, or Winchester, or any of them, or to any cathedral or collegiate church; nor to any college, hospital, or free school, which have special visitors, or governors, or overseers appointed them by their founders.

Elections in colleges.

15. By the 33 *H.* 8. *c.* 27. Albeit that by the common law all assents, elections, and grants, made and granted by the dean, warden, provost, master, president, or other governor of any college or other corporation, with the assent of the major part of the fellows or brethren of such corporation, be as effectual as if the whole number had assented: yet, nevertheless, divers founders of such corporations have amongst other their local statutes [484] established, that if any one of such corporation should deny any such grant, then no such election or grant should be made, and for performance of the same every person having power of assent hath been wont to be sworn; for remedy thereof it is enacted, that every statute made by any such founder, whereby the grant or election of the governor or ruler, with the assent of the more part of such corporation, should be in anywise hindered by any one or more, being the lesser number (contrary to the course of the common law), shall be void; and none shall be compelled to take an oath for the observing of any such statute, on pain of every person giving such oath to forfeit 5*l.*; half to the king, and half to him that shall sue in any of the king's courts of record.

But such major part are to attend in person, and to be present together, at the executing of such act; and the assent must be given by each member singly, and not in a confused and uncertain manner; and this must be when they are regularly assembled in one certain place, and not a consent given by the members in several places and at several times. *Gibs.* 744.

Bribery at elections.

And by the 31 *El. c.* 6. Whereas by the intent of the founders of colleges, churches collegiate, churches cathedral, schools, hospitals, halls, and other like societies within this realm, and by the statutes and good orders of the same, the elections, presentations, and nominations of fellows, scholars, officers, and other persons to have room or place in the same, are to be had and made of the fittest and most meet persons being capable of the same elections, presentations, and nominations, freely, without any reward, gift, or thing given or taken for the same; and for

true performance whereof, some electors, presentors, and nominators in the same have or should take a corporal oath to make their elections, presentations, and nominations accordingly; yet notwithstanding, it is seen and found by experience, that the said elections, presentations, and nominations be many times wrought and brought to pass with money, gifts, and rewards; whereby the fittest persons to be elected, presented, or nominated, wanting money or friends, are seldom or not at all preferred, contrary to the good meaning of the said founders, to the said good statutes and ordinances of the said colleges, churches, schools, halls, hospitals, and societies, and to the great prejudice of learning and the commonwealth and estate of the realm; for remedy thereof
[485] it is enacted, that if any person which hath election, presentation, or nomination, or voice or assent in the choice, election, presentation, or nomination, of any fellow, scholar, or any other person, to have room or place in any of the said churches, colleges, schools, hospitals, halls, or societies, shall have, receive, or take any money, fee, reward, or any other profit, directly or indirectly, or shall take any promise, agreement, covenant, bond, or other assurance, to receive or have any money, fee, reward, or any other profit, directly or indirectly, either to himself or to any of his friends, for his voice, assent, or consent, in electing, choosing, presenting, or nominating any officer, fellow, scholar, or other person, to have any room or place in any of the said societies; then, and from thenceforth, the place, room, or office, which such person so offending shall then have in any of the said churches, colleges, schools, halls, hospitals, or societies, shall be void as if he were naturally dead. § 1, 2. (*k*)

And if any fellow, officer, or scholar, of any of the said societies, or other person having room or place therein, shall directly or indirectly take or receive, or by any device or means contract or agree to have or receive, any money, reward, or profit whatsoever, for the leaving or resigning up of the same his room or place, for any other to be placed in the same; he shall forfeit and lose double the sum of money, or value of the thing so received and taken, or agreed to be received and taken: and every person by whom, or for whom, any money, gift, or reward as aforesaid shall be given or agreed to be paid, shall be incapable of that place or room for that time or turn. § 3.

And for the more sincere election, choice, presentation, and nomination of fellows, scholars, officers, and other persons to have room or place in any of the said churches, colleges, halls, schools, hospitals, and other the like societies; it is further enacted, that at the time of every such election, presentation, or nomination to be had, as well this present act, as the orders and statutes of the same places concerning such election, pre-

(*k*) See Cathedrals, 6.

sentation, or nomination to be had, shall then and there be publicly read: on pain that every person in whom default thereof shall be, shall forfeit and lose the sum of 40*l.*; half to him that shall sue, and half to the use of the society. 31 *El. c.* 6. § 4.

16. Several founders of colleges have, in their statutes for the government of the said colleges, given a certain degree of preference, in the election of scholars or others, to those of their own blood: concerning which there hath been much dispute. It is contended on one side, that by length of time all relation of kindred must necessarily wear out; on the other, that this cognation still subsists, and may subsist indefinitely. On behalf of those who claim as kinsmen (although from the time of the foundation of the respective colleges they may be supposed to be not nearer now than the tenth, twelfth, or perhaps fifteenth degree from the common ancestor by whom they deduce their relation to the founder) it is urged, that no length of time can utterly extinguish their kindred; that no limits have ever been set to consanguinity by any law whatsoever; particularly, that by the municipal laws of this realm, in the succession to inheritances, no boundary is limited, but lands descend to the heirs of the first purchaser *in infinitum;* and that by the college statutes no limitation is intended, being general, in this or the like form:—"Volumus, quod in omni electione scholarium, "futuris temporibus facienda, principaliter et ante omnes alios, "illi qui sunt vel erunt de consanguinitate nostra aut genere, "si qui tales sint, ubicunque fuerint oriundi, dum tamen sint "reperti habiles et idonei, secundum conditiones superius et "inferius recitatas, sine aliquo probationis tempore, &c. eligantur." It is contended, on the other hand, that it is absolutely necessary that some limitation should be fixed, otherwise such statute must defeat its own intention. As all collateral consanguinity consists in being derived from one common parent, if this consanguinity knows no bounds, all mankind are without doubt kinsmen, because derived from the same original ancestor. As, for instance, the common stock of the founder and his nephew is the founder's father; the common stock of the founder and his cousin german is the founder's grandfather; of him and his second cousin is his great grandfather; and so on: all these are confessedly his kinsmen, and yet all derived from different common stocks. But unless there be some period to stop at, by the same rule that the common stock may be assumed three generations above either of the related parties, it may be assumed three hundred; we may ascend to Noah, or to Adam, and make him the stirps of universal consanguinity.—That by the civil law, all notion of consanguinity is extinguished, at the furthest after the tenth degree. Similar to which is the law of successions established by the present king of Prussia; who in his

Preferences given to founder's kinsman.

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by the king to consider of the claim of another Wykeham. This they determine to be groundless; founding their opinion on the decree of the 30 Jan. 1579; and also on the great inconvenience that would follow, if the "founder's consanguinity should be so "exceedingly multiplied as it would be, to the absolute restraint "of the freedom of elections, if such claims were admitted."

In the year 1651, during Cromwell's usurpation, the same question was brought before the committee of the house of commons, for regulation of the two universities, and the colleges of Eton and Winchester, probably with a view to re-establish the unlimited preference of kindred; but all they could obtain was, an order for augmenting the number of 18 kinsmen, established by bishop Cooper, to 20 in both societies; with a proviso, that if more than twenty had already crept in, no more should be admitted till the number was reduced to twenty.

Nevertheless, at this day, it must be acknowledged, by whatsoever means it hath happened, that though the annual restriction of two in the said colleges continues in use, yet the total restriction of 18 (or 20) has fallen into oblivion.

And as the limitation of *number* in the said colleges hath been attempted, so in the college of All Souls in the said university, founded by archbishop Chichele in the year 1438, it hath been endeavoured to obtain a limitation in the *degrees*, for the reasons above expressed. But in the cases that have been determined by the several visitors, no certain boundary hath been yet established; the same having been adjudged on the particular circumstances of each case. *Blackst. on Collateral Consanguinity.*

So that it seemeth still to remain a matter of great doubt.
[490] For, as on the one hand, it could never be the founder's intention to fill the college wholly with his own kindred; so, on the other, as he himself has been silent in that respect, it is difficult to say at what precise period his particular regard to his own family and relations, however distant, should entirely cease. A limitation in point of number seemeth to be most apposite, as was directed by bishop *Cooper* in the case of *Wykeham's* foundations, in some kind of proportion to what may be supposed, or from the registers of the respective colleges may appear, to have been in the founder's days, or within an age or two afterwards; for so the founder's whole institution will take effect: that is, far the greater part of the society will consist of persons elected out of the public at large, or otherwise according to the restrictions of the respective foundations; and at the same time a reasonable regard will be had to those who can prove themselves of the founder's kindred; although it must be owned, at this day, that the proportion is scarcely so much, as of one drop of blood to the whole mass.

There is in human nature a desire of immortality, which ex-

pands itself without limitation even in this life. Every man wishes to live in his posterity, and to transmit his inheritance to them at whatever distance: and those posterity, on the other hand, glory in deriving their pedigree through a long series of ancestors: and the higher they can ascend, the more honourable it is esteemed. Even that excellent author, from whom the above state of the case is taken, who argues incontestably for the necessity of *some* limitation, yet in his dedication of the charters compliments his patron, on being, "the defender of those liberties "of which his ancestor attested the execution;" which attestation was long before the foundation of any of the colleges wherein the present question is agitated. Many noble families of this kingdom boast of their descent from some of those heroes who came in with the Norman invader. The inhabitants of Wales ascend further, into the Saxon period; when their progenitors chose rather to lose their country than their liberty: and they still endeavour to preserve their genealogies, although the reason thereof (as it seemeth) hath been long since forgotten; which most probably was, that upon their return each man might be able to deduce his title to his own estate. The Jews, for a longer term, have been solicitous to keep up the distinction of their tribes; partly for a like reason, and partly that they may be able to ascertain the descent of their expected Messiah. The [491] Scots, in the time of king James the first of England, flattered that prince on his being the 108th king of Scotland lineally descended of one stock; which, according to a reasonable computation, would carry us up almost as far as the days of Solomon (the great ancestor of that monarch, as one would be tempted to conclude from the court writings of those times). — And the more chimerical such calculations may be, so much the more they demonstrate the honourable esteem entertained thereof by mankind, where they are real.

Persons elected to subscribe the declaration of conformity.

17. By the 13 & 14 *C.* 2. *c.* 4. and the 1 *W. sess.* 1. *c.* 8. § 11. All masters, and other heads, fellows, chaplains, and tutors of or in any college, hall, house of learning, or hospital, and every public professor and reader in either of the universities, and in every college elsewhere, who shall be incumbent or have possession of any mastership, headship, fellowship, professor's place, or reader's place, shall, at or before his admission, subscribe the declaration or acknowledgment following, before the vice-chancellor or his deputy: "I, A. B., do declare, that I will conform "to the liturgy of the church of England, as it is now by law "established:" upon pain, that every of the persons aforesaid failing in such subscription, shall lose and forfeit such respective mastership, headship, fellowship, professor's place, or reader's place, and shall be utterly disabled, and *ipso facto* deprived of

the same; and the same shall be void, as if such person so failing were naturally dead.

But by the 2 *G.* 2. *c.* 31. § 8. Persons who had omitted to subscribe the same before the vice-chancellor as aforesaid, were indemnified: provided they should then subscribe before Dec. 25. 1729.

Heads of colleges to subscribe also the 39 articles, and the book of common prayer.

18. By the aforesaid statute of the 13 & 14 *C.* 2. *c.* 4. Every governor or head of any of the said colleges or halls, shall, within one month next after his election or collation and admission into the same government or headship, openly and publicly in the church, chapel, or other public place of the same college or hall, and in the presence of the fellows and scholars of the same, or the greater part of them then resident, subscribe unto the nine and thirty articles of religion mentioned in the statute of 13 *Eliz.* c. 12. and to the book of common prayer, and declare his unfeigned assent and consent unto, and approbation of, the said articles and of the same book, and to the use of all the prayers, rites and ceremonies, forms and orders, in the said book pre-
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scribed and contained, according to this form following: "I, "A. B., do here declare my unfeigned assent and consent to all "and every thing contained and prescribed in and by the book "intituled, The book of common prayer and administration of "the sacraments and other rities and ceremonies of the church, "according to the usage of the church of England; together "with the psalter or psalms of David, pointed as they are to be "sung or said in churches; and the form or manner of making, "ordaining, and consecrating of bishops, priests, and deacons." And all such governors or heads of the said colleges and halls, or any of them, as shall be in holy orders, shall once at least in every quarter of the year (not having a lawful impediment) openly and publicly read the morning prayer and service in and by the said book appointed to be read, in the church, chapel, or other public place of the same college or hall; upon pain to lose and be suspended of and from all the benefits and profits belonging to the same government or headship, by the space of six months, by the visitor or visitors of the same college or hall: and if any governor or head of any college or hall, suspended for not subscribing unto the said articles and book, or for not reading the morning prayer and service as aforesaid, shall not at or before the end of six months next after such suspension subscribe unto the said articles and book, and declare his consent thereunto as aforesaid, then such government or headship shall be *ipso facto* void. § 17.

And all of them to take the oaths, and

19. By the 1 *G. st.* 2. c. 13. All heads and members of colleges, being of the foundation, or having any exhibition, of eighteen years of age; and all persons teaching pupils; and all

persons in general admitted to any office in any such college, ecclesiastical or civil, shall (within six months after their admission, 9 *G.* 2. *c.* 26. § 3.) take and subscribe the oaths of allegiance, supremacy, and abjuration, in one of the courts of Westminster, or at the general or quarter sessions of the peace [§ 1.]; on pain of being disabled to sue or use any action; or to be guardian, executor, or administrator; or capable of any legacy or deed of gift; or to be in any office; or to vote at any election for members of parliament; and to forfeit 500*l.* to him who shall sue. [§ 8. Confirmed by 9 *G.* 2. *c.* 31. § 6, 7. and *c.* 26. § 5, 6.] And if any such head or member, being of the foundation, or having any exhibition, of eighteen years of age, shall neglect or refuse to take and subscribe the same, or to produce a certificate thereof under the hand of some proper officer of the respective court, and cause the same to be entered within one month in the register of such college or hall: and if the persons in whom the right of election shall be, shall neglect or refuse to elect another for the space of twelve months, the king shall nominate to such place vacant [1 *G.* 1. *st.* 2. *c.* 13. § 12.]; and if the person lawfully authorised to admit, shall neglect or refuse to admit such person so nominated by the king for the space of ten days, the local visitor shall admit him within one month; and if he shall refuse, the king's bench may compel him by mandamus. [*Id.* § 13.] [493]

make the subscriptions, as other persons qualifying for offices.

And if it is a *civil* office (not *ecclesiastical*), they shall moreover, by the 25 *C.* 2. *c.* 2., on the like pain as aforesaid, within three months after their admission, receive the sacrament in some public church on he Lord's day, immediately after divine service and sermon: and, in the court where they take the oaths, shall first deliver a certificate of such their receiving, under the hands of the minister and churchwarden: and shall then make proof of the truth thereof by two witnesses: and shall also, when they take the said oaths, make and subscribe the declaration against transubstantiation.

But there is an indemnifying clause in some act of parliament every two or three years; provided they comply within a time therein limited.

20. By the same statute, 13 & 14 *C.* 2. *c.* 4. No form or order of common prayers, administration of sacraments, rites or ceremonies, shall be openly used in any church, chapel, or other public place of or in any college or hall in either of the universities, the colleges of Westminster, Winchester, or Eton, or any of them, other than what is prescribed or appointed to be used in and by the book of common prayer:——Provided, that it shall be lawful to use the morning and evening prayer, and all other prayers and services prescribed in and by the said book, in the chapels or other public places of the respective colleges

Common prayer may be used in Latin.

and halls in both the universities, in the colleges of Westminster, Winchester, and Eton, and in the convocations of the clergy of either province, in Latin. § 17, 18. (It is not said of what translation.) (2)

Common prayer before sermons or lectures.

21. And by the same statute, at all times when any sermon or lecture is to be preached, the common prayers and service in and by the book of common prayer appointed to be read for that time of the day, shall be openly, publicly, and solemnly read by some priest or deacon, in the church, chapel, or place of public worship where the said sermon or lecture is to be preached, before such sermon or lecture be preached; and that the lecturer
[494] there to preach shall be present at the reading thereof:— Provided, that this shall not extend to the university churches in the universities of this realm, or either of them, when or at such times as any sermon or lecture is preached or read in the said churches, or any of them, for or as the public university sermon or lecture; but that the same sermons and lectures may be preached or read, in such sort and manner as the same have been heretofore preached or read. § 22, 23.

Divine service in general.

22. By *Can.* 16. In general, in the whole divine service, and administration of the holy communion, in all colleges and halls in both the universities, the order, form, and ceremonies, shall be duly observed, as they are set down and prescribed in the book of common prayer, without any omission or alteration.

The holy communion.

23. By *Can.* 23. In all colleges and halls within both the universities, the masters and fellows, such especially as have any pupils, shall be careful that all their said pupils, and the rest that remain amongst them, be well brought up, and thoroughly instructed in points of religion; and that they do diligently frequent public service and sermons; and receive the holy communion, which we ordain to be administered in all such colleges and halls the first or second Sunday of every month; requiring all the said masters, fellows, and scholars, and all the rest of the students, officers, and all other the servants there, so to be ordered, that every one of them shall communicate four times in the year at the least, kneeling reverently and decently upon their knees, according to the order of the communion book prescribed in that behalf.

But by the rubric in the book of common prayer, in cathedral and collegiate churches where there are many priests and deacons, they shall all receive the communion with the priest every Sunday at the least, except they have a reasonable cause to the contrary.

Surplices and hoods.

24. By *Can.* 17. All masters and fellows of colleges or halls,

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(2) The universities of Oxford and Cambridge may celebrate divine service in their chapels, not being parish churches (except the holy communion), in Greek, Latin, or Hebrew. 2 & 3 *Ed.* 6. c. 1. § 6.

and all the scholars and students in either of the universities, shall in their churches and chapels, upon all Sundays, holidays, and their eves, at the time of divine service, wear surplices, according to the order of the church of England; and such as are graduates, shall agreeably wear with their surplices such hoods as do severally appertain unto their degrees. on solemn days.

25. By the 1 *Eliz. c.* 1. § 25. and the 1 *W. c.* 8. Every person before he shall be preferred to any degree of learning in either of the universities, shall take the oaths of allegiance and supremacy, before the chancellor, vice chancellor, or their sufficient deputy. Oaths to be taken on admission to degrees. [495]

26. [By 55 *Geo.* 3. *c.* 184. [Schedule, Part the First, tit. **Admission.**] For every skin or piece of vellum or parchment, or sheet or piece of paper, on which any matriculation in the universities shall be written or ingrossed, shall be paid a stamp duty of 1*l.* And for the register or entry of the degree of a bachelor of arts in the universities, if conferred in the ordinary course, 3*l.*: if otherwise, 5*l.* Of any other degree, if in the ordinary course, 6*l.*; if otherwise, 10*l.* And for the certificate [or testimonial] of the admission of any person to the degree of a bachelor of arts, a duty of 3*l.* is to be paid; and for any other degree 10*l.* [Stamp duties.]

27. By 54 *Geo.* 3. *c.* 156. § 2. Eleven printed copies of the whole of every book, and of every volume thereof, upon the paper on which the largest number or impression of such book shall be printed for sale, together with all maps and prints belonging thereto, which from and after the passing of this act (*viz.* July 29, 1814.) *shall be printed and published* (3), on demand in writing left at the publisher's place of abode, at any time within 12 months next after publication thereof, under the hand of the warehousekeeper of the company of stationers, or of the librarian, or other person thereto authorized by the persons or body politic and corporate, proprietors and managers of the libraries following, *viz.* the *British Museum*, *Sion College*, *Bodleian* library at *Oxford*, public library at Cambridge, the library of the faculty of advocates at Edinburgh, the libraries of the four universities of Scotland, Trinity College library and King's Inn [Books.]

(3) The parallel words in 8 *Ann. c.* 19. § 5. (which seems virtually superseded by the above provision of 54 *G.* 3.) were held to make it necessary for the printer of a book composed after the passing of the act, and published for the first time after the composition, which book is printed and published with the consent of the proprietor of the copyright, to deliver a copy upon the best paper to the warehousekeeper of the company of stationers, for the use of the library of the university of *Cambridge*, notwithstanding the title to the copy of such book, and the consent of the proprietor to its publication be not entered in the register book of the said company. *Cambridge University* v. *Bryer*, 16 *East*, 317.

library at Dublin, or so many of such 11 copies as shall be respectively demanded on behalf of such libraries respectively, shall be delivered by the publisher within one month after demand made thereof in writing to the warehousekeeper of the stationers' company; which copies he shall receive at the company's hall for the use of the library for which such demand is made within such 12 months as above, and shall within one month after any such book or volume is delivered to him as above, deliver the same for the use of such library, and if any publisher, or such warehousekeeper shall not observe the directions of this act therein, and shall make default in not delivering or receiving the said 11 printed copies, he shall forfeit, besides their value, the sum of 5*l.* for each copy not so delivered or received, with full costs of suit, the same to be recovered in an action of debt in any court of record in the united kingdom by the person or persons, or body politic or corporate, proprietors or managers of the library for the use whereof such copy or copies ought to have been delivered. § 3—7. contain further provisions in support of the above.]

And by the 43 *G.* 3. *c.* 69. (which imposes a duty upon paper), paper used in printing books within the universities in the Latin, Greek, Oriental, or northern languages, shall have a drawback of the said duty. [Sch. C. tit. *Paper.*]

Printing. 28. By the 13 & 14 *C.* 2. *c.* 33. § 3. (which after several continuances expired in the year 1692) it was enacted, that no private person whatsoever should print or cause to be printed any book or pamphlet, unless the same should be first entered in the book of the register of the company of stationers in London; except acts of parliament, proclamations, and such other books and papers as should be appointed to be printed by virtue of the king's sign manual, or under the hand of one of the secretaries of state; and unless the same should be first licensed by the several persons therein directed; that is to say, all books concerning the common law were to be printed by the allowance of the lord chancellor, the lords chief justices and lord chief baron, or one of them; of history concerning the state of this realm, or other books concerning any affairs of state, by one of the secretaries of state; of heraldry, by the appointment of the earl
[496] marshal, or if there should be no earl marshal, then by two of the kings of arms; all other books, whether of divinity, physic, philosophy, or other science or art whatsoever, by the archbishop of Canterbury, or bishop of London, or by their appointment respectively; or, in the universities, by the chancellor or vice-chancellor there, provided that the said chancellors or vice-chancellors should not meddle either with books of common law, or matters of state or government, nor any book the right of printing whereof solely and properly belonged to any particular person. And the printers were to set their names, and declare

the name of the author if required.—But there was a proviso, nevertheless, that nothing therein should extend to infringe any the just rights and privileges of either of the said universities, touching the licensing or printing of books therein; nor should extend to prejudice the just rights and privileges, granted by the king or any of his royal predecessors, to any person or persons, under the great seal or otherwise, but that they might exercise such rights and privileges according to their respective grants.

What those privileges are, came to be considered in the case of *Thomas Baskett* and *Robert Baskett*, administrators (with the will annexed) of *John Baskett*, plaintiffs; and the chancellor, masters, and scholars, of the university of *Cambridge*, *Joseph Bentham*, and *Charles Bathurst*, defendants; *M.* 32 *G.* 2., which was as follows: The plaintiffs brought a bill in the court of chancery, for an injunction to restrain the defendants from printing or selling a book, intitled, "An exact *abridgment* of all the acts "of parliament relating to the excise on beer (and other excise- "able liquors)." And on the hearing of this cause, Jan. 24. 1743, the lord chancellor ordered that a case should be stated, for the opinion of the judges of the court of king's bench, upon the several acts of parliament, letters patent, and grants of the crown, insisted on by either side, and any other letters patent appearing upon record relating to the matters in question between the parties.——The several letters patent insisted on by the plaintiffs in support of their claim as the king's printers, to the sole and exclusive right of printing and publishing all acts of parliament or abridgments of acts of parliament, bear date Ap. 22. in the first of Ed. the sixth; Dec. 29. in the first of queen Mary; Mar. 24. in the first of Elizabeth; Sep. 27. in the nineteenth of Elizabeth; Aug. 8. in the thirty-first of Elizabeth; May 10. in the first of James the first; Feb. 11. in the fourteenth of James the first; July 20. in the third of Charles the first; [497]
Sept. 26. in the eleventh of Charles the first; Dec. 24. in the twenty-seventh of Charles the second; and Oct. 13. in the twelfth of Anne. They expressly grant the sole power of printing all and all sorts of abridgments of all and singular statutes and acts of parliament, and prohibit all other persons to print any volume, book, or work, of which the printing was thereby granted. The estate and interest granted by the said letters patent became vested in John Baskett, father of the now plaintiffs; and is now vested in the plaintiffs, as administrators to their said father with his will annexed: and the plaintiffs have been sworn and admitted into the said office of his majesty's printer. The case further stated, that the plaintiffs and other printers to his majesty and his royal predecessors have, by virtue of the said several letters patent to them respectively granted, from time to time, printed all acts of parliament and abridgments of acts of parliament, bibles,

new testaments, and other books mentioned in the said letters patent. And the plaintiffs claim the sole right of printing all acts of parliament, exclusive of all other persons, during the term granted by the said letters patent of the 12th of queen Anne.

The defendants founded their claim upon the several letters patent and act of parliament following: King Hen. 8. by his letters patent, July the 20th, in the 26th year of his reign, for him and his heirs, granted licence to the chancellor, masters, and scholars of the university of Cambridge, that they and their successors for ever, by their writing under the seal of the said chancellor, from time to time might assign and chuse and for ever have among themselves and within the university aforesaid always remaining and inhabiting, three stationers and printers or venders of books, as well aliens and born without, as natives and born within his said majesty's obedience, having and holding as well hired houses as houses of their own: which said stationers or printers in form aforesaid assigned, and any of them, might lawfully there print all manner of books approved or which thereafter should be approved by the said chancellor or his vice-chancellor and three doctors there; and as well those books, as other books printed wheresoever, as well within his said majesty's realm as without, so as aforesaid approved or to be approved, might put to sale, as well within the said university, as elsewhere within this kingdom, wheresoever they shall please. The statute of the 13th Eliz. confirms all letters patent
[498] granted to the said university. By letters patent dated 6th Feb. 3 *Cha.* 1. reciting the said letters patent of 26th *Hen.* 8., and the said act of parliament of the 13th *Eliz.* and also reciting, that since the said act of parliament, divers letters patent had been made by queen Elizabeth, king James the first, and his then majesty, granting authority to print divers and sundry books, and prohibiting generally all other persons to print the same; and also reciting a decree in the court of star-chamber of the 23d June 28 *Eliz.* and a proclamation of the 25 Sept. 21 *Ja.* 1. inforcing the same; the king confirms the right granted by the said letters patent of 26 *Hen.* 8. to the university of Cambridge, notwithstanding any grant or prohibition contained in the subsequent letters patent or any of them.

The questions upon this case are,

1. Whether the plaintiffs are intitled to the sole right of printing acts of parliament and abridgments of acts of parliament, exclusive of all other persons, during the term granted by the said letters patent dated Oct. 13. in the 12th year of the reign of queen Anne.

2. Whether the defendants, the chancellor, masters, and scholars of the university of Cambridge, by virtue of the grants and acts of parliament insisted on by the said defendants, or

any of them, have the right or privilege of printing acts of parliament or abridgments of acts of parliament.

This case was first argued in Michaelmas term 1745, by Mr. Comyns for the plaintiffs, and Mr. Noel for the defendants. It was argued a second time in Michaelmas term 1747, by Mr. Gundy for the plaintiffs, and sir Richard Lloyd for the defendants. It was argued a third time in Hilary term 1749, by Mr. Hume for the plaintiffs, and Mr. Henley for the defendants. It then stood for the certificate of the judges; which having been put off for several years during the life of lord chief justice Lee, the parties did not apply to have it argued again whilst the lord chief justice Ryder lived: but in Trinity term 1758, they applied to have it set down for further argument in the next Michaelmas term.

Before it came on, the court ordered copies of all the above-mentioned letters patent, acts of parliament and instruments to be left with them. They also ordered copies of the charter to the stationers of London of the 4th of May, 3 & 4 *Ph.* and *Mar.* the grant to the university of Oxford to print law books dated the 12th of Aug. 9 *G.* 2. and the proclamation of the 25th of Sept. 21 *Ja.* 1. against the disorderly printing of books; and the several decrees of the court of star-chamber relative thereto. [499]

On Nov. 17. 1758, it was argued by Mr. Comyns for the plaintiffs, and Mr. Solicitor General Yorke for the defendants.

And soon after this last argument, the following certificate was made:

Having heard counsel on both sides, and considered of this case, we are of opinion, that during the term granted by the letters patent dated the 13th of October in the 12th year of the reign of queen Anne, the plaintiffs are entitled to the right of printing acts of parliament and abridgments of acts of parliament, exclusive of all other persons not authorized to print the same by prior grants from the crown.

But we think, that by virtue of the letters patent bearing date the 20th day of July in the 26th year of the reign of king Henry the 8th, and the letters patent bearing date the 6th of February in the 3d year of the reign of king Charles the first, the chancellor, masters, and scholars of the university of Cambridge are entrusted with a concurrent authority to print acts of parliament and abridgments of acts of parliament, within the said university, upon the terms in the said letters patent.

Nov. 24. 1758.

MANSFIELD.
T. DENISON.
M. FOSTER.
E. WILMOT.

N. B. In a letter from Mr. Justice *Foster* to sir *William Blackstone*, who was then at Oxford, in which letter was inclosed the said certificate, he says, "I thought it would be agreeable "to you to know the issue of the cause. The word *intrusted* "was inserted by way of intimation to the university, that we "consider the power given by the letters patent, as a trust re- "posed in that learned body, for public benefit, for the ad- "vancement of literature, and not to be transferred upon lu- "crative views to other hands." *Black. Rep.* 122.

Lord Coke, out of a filial regard to his *alma mater*, observes (4 *Inst.* 228.), that the university of Cambridge hath power to print within the same *omnes et omnimodos libros*: which, he says, the university of *Oxford* hath not. Nevertheless, certain it is, that he lived many years after the date of the last of those charters, which grants to the university of Oxford a like power as is granted by the above mentioned charters to the university of Cambridge.

[500] By letters patent 8 *Cha.* 1. Nov. 12. the king grants to the university of Oxford licence to appoint three printers, either aliens or natives, residing within the university, every of whom shall have power to print all manner of books (*omnimodos libros*) *not publicly prohibited*, and copies of books, to be approved by the chancellor or his vice-chancellor and three doctors (one of whom at least to be professor of divinity) appointed by the chancellor, masters, and scholars for the examination of books: and as well the same books, as others wheresoever printed within the king's dominions or without, and approved as aforesaid, as well within the said university as elsewhere, to expose to sale and sell; and that alien born printers, employed within the said university, shall in all respects be considered as natural born subjects, except as to customs and subsidies.

8 *Cha.* 1. Mar. 13. The king recites and confirms the former grant; and further gives leave to every of the university printers to employ two presses (notwithstanding a decree in the star-chamber 28 *Eliz.* to the contrary), and to take two apprentices: And moreover grants, that if any of the said printers shall, under the conditions aforesaid, print any book in any language from any manuscript in any library within the university of Oxford (the same never having been printed before); no person, without leave of the university, shall presume to reprint the same for the space of 21 years: and the same privilege is granted for ten years, as to any books so printed by the university printers, which shall be composed *de novo*, and published by any master or scholar: under pain of forfeiture of the surreptitious books in both cases.

11 *Cha.* 1. Mar. 3. Reciting that almost from the first in-

troduction of printing into England there had been printers in the university of Oxford, who by virtue of the privilege of the same university (before any charter, inhibition, restriction, or limitation of printing was made) had free power of printing books and selling them throughout the whole realm, as appears from many printed books and monuments then extant; which privileges were confirmed by the statute of 13 *Eliz.* Since which time (although in the decree of the star-chamber 23 Jan. 28 *Eliz.* which allows one press to the university, no restriction or limitation of books to be there printed occurs, except a general provision for observing certain letters patent and commissions under the great seal, and certain ordinances for the better government of the company of stationers in London) some questions having arisen between the company of stationers and others [501] concerning the exercise of the art of printing, certain books *publicly approved and received* had been, by letters patent of queen Elizabeth, king James, and the then king, peculiarly reserved to be printed by the company of stationers and other persons, particularly Robert and Christopher Barker, John Bill, and Bonham Norton; and reciting also the letters patent of 12 Nov. and 13 Mar. 8 *Cha.* to the university of Oxford, and that now the London stationers pretend that all the books so peculiarly reserved for their printing are books *publicly prohibited*, and (as such) not within the university privilege, whereby the university printers are deterred from the free exercise of their powers; therefore the king ratifies and confirms for ever the aforesaid letters patent, and gives power to the university to make laws and ordinances for the better government of printing within the same: and further doth interpret, expound, and declare, that those books of what kind soever, peculiarly reserved to be printed by the company of stationers or other persons whatsoever, are not, nor ought to be deemed, books *publicly prohibited*, forasmuch as they are rather such as are commonly approved for the public use of all the king's subjects; and which, if they were publicly prohibited, neither the company of stationers nor any other persons could lawfully print and expose to sale: and therefore that it shall be lawful to the printers, stationers, or booksellers of the university of Oxford, assigned as is aforesaid in the aforesaid letters patent, from time to time for ever, to print within the said university and the precincts thereof, according to the form in the said letters patent prescribed, the same books, and every book of what kind soever, contained in the charters of the stationers of the city of London and their successors, or of other printers whatsoever, and so peculiarly reserved to the printing of them and their successors or assigns, and also all other books whatsoever not publicly prohibited as aforesaid: as well in the English, as in any foreign language, or

mixt therewith; and the same, sewed or bound, in large volumes or in small, as well within the said university and the precincts thereof, as elsewhere within the king's dominions, publicly to expose to sale. And these letters patent are ordered to be construed in the most beneficial manner for the university; notwith-
[502] standing any mis-recitals, or non-recitals, or any other defects or imperfections whatsoever. (*l*)

Popish livings.

29. By the 3 *Ja.* *c.* 5. Every person that shall be a popish recusant convict, during the time that he shall remain a recusant, shall be utterly disabled to present to any benefice, prebend, or any other ecclesiastical living, or to collate or nominate to any free school, hospital, or donative, or to grant any avoidance of any benefice, prebend, or other ecclesiastical living [§ 18.]: and the chancellor and scholars of the university of Oxford, so often as any of them shall be void, shall have the presentation, nomination, collation, and donation thereof, lying within the counties of Oxford, Kent, Middlesex, Sussex, Surrey, Hampshire, Berkshire, Buckinghamshire, Gloucestershire, Worcestershire, Staffordshire, Warwickshire, Wiltshire, Somersetshire, Devonshire, Cornwall,

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(*l*) The 15 *G.* 3. *c.* 53. enables the two universities in England, the four in Scotland, and the colleges of Eton, Westminster, and Winchester, to have for ever the sole right of printing such books as have been or shall be bequeathed to them, unless the same have been or shall be bequeathed for a limited time. They may also sell the copyright in like manner as any author under the provision of the 8 *Ann.*

The 21 *G.* 3. *c.* 56. § 10. reciting, that whereas the power of granting a liberty to print almanacks, and other books, was heretofore supposed to be an inherent right in the crown: and whereas the crown hath, by different charters under the great seal, granted to the universities of Oxford and Cambridge, among other things, the privilege of printing *almanacks*; and whereas the universities did demise to the company of stationers of the city of London their privileges of printing and vending almanacks and calendars, and have received an annual sum of 1000 pounds and upwards as a consideration for such privilege; and whereas the money so received by them has been laid out and expended in promoting different branches of literature and science, to the great increase of religion and learning, and the general benefit and advantage of these realms; and whereas the privilege or right of printing almanacks has been, by a late decision at law [*viz.* *Stationers' Company* v. *Carnan*, 2 *Bla. Rep.* 1004.], found to have been a common right, over which the crown had no controul, and consequently the universities no power to demise the same to any particular person, or body of men, whereby the payments so made to them by the company of stationers have ceased and discontinued; enacts, that out of the duties granted by that act there shall be paid 500*l.* a year to each of the two universities (half-yearly) at Midsummer and Christmas.—This annual grant of 500*l.* has been confirmed to each of the said universities, by the 44 *G.* 3. *c.* 98. schedule C. [which is not repealed by 55 *G.* 3. *c.* 184. § 1.]

Dorsetshire, Herefordshire, Northamptonshire, Pembrokeshire, Caermarthenshire, Brecknockshire, Monmouthshire, Cardiganshire, Montgomeryshire, the city of London, and in every city and town being a county of itself, lying within the precincts of any of the counties aforesaid [§ 19.]: and the chancellor and scholars of the university of Cambridge shall have the presentation, nomination, collation, and donation thereof, lying within the counties of Essex, Hertfordshire, Bedfordshire, Cambridgeshire, Huntingdonshire, Suffolk, Norfolk, Lincolnshire, Rutlandshire, Leicestershire, Derbyshire, Nottinghamshire, Shropshire, Cheshire, Lancashire, Yorkshire, the county of Durham, Northumberland, Cumberland, Westmoreland, Radnorshire, Denbighshire, Flintshire, Carnarvonshire, Angleseyshire, Merionethshire, Glamorganshire, and in every city and town being a county of itself, lying within the precincts of any of the counties aforesaid. [§ 20.]

There are many other particulars concerning such presentations, nominations, collations, and donations [See 1 *W.* & *M.* st. 1. *c.* 26.]: which falling in more properly under the title **Popery**, are there at large inserted. [*Dirs.* v. xxx.]

30. By *Can.* 36. The universities have a concurrent power with the archbishops and bishops, in granting licences to preach. **Licence to preach.**

31. By *Can.* 33. No person shall be admitted into sacred orders, except he shall exhibit to the bishop a presentation or certificate, that he is provided of some church wherein to officiate: or that he is a fellow, or in right as a fellow, or to be a conduct or chaplain in some college in Cambridge or Oxford, or except he be a master of arts of five years' standing that liveth of his own charge in either of the universities, or except he be to be admitted by the bishop himself to some benefice or curateship then void. **Title for orders.**

32. [By statute 57 *Geo.* 3. *c.* 99. § 1. So much of the statute of non-residence 21 *Hen.* 8. *c.* 13. as relates to the residence of spiritual persons on their benefices, and the whole of 28 *Hen.* 8. *c.* 13. to the same effect, is repealed: and by § 10. No bursar treasurer, dean, vice-president, sub-dean, or public tutor or chaplain, or other such public officer, in any college or hall in Oxford or Cambridge, during his official and actual residence to perform the duties of any such office: no public librarian, public registrar, proctor, or public orator, or such like public officer, in either Oxford or Cambridge, during like official and actual residence; no fellow of any college in such universities, during the time for which he may be required to reside by charter or statute, and shall actually reside therein; no warden, provost, or fellow of Eton or Winchester colleges, or master of Charter-house, during the time he is required to and shall actually reside therein, or **[How far being conversant in the universities shall dispense with non-residence.]**

within the city or town or suburbs thereof, within or near which the colleges are respectively situate; and no proctor or usher in the colleges of Eton, Winchester, or Westminster school, or as principal or professor of the East India College (who is also protected by 53 *G.* 3. *c.* 155. § 48.) shall be liable to any of the penalties of this act for any non-residence, during any such period as aforesaid, on any benefice; but every such spiritual person, with respect to residence under this act, shall be entitled to account such period as if he had legally resided on some other benefice. See **Residence**, *infra*.]

What degrees are requisite for plurality.

33. *Can.* 41. No licence or dispensation for the keeping of more benefices with cure than one shall be granted to any, but such as shall have taken the degree of a master of arts, at the least, in one of the universities of this realm. In which case also, by the statute of 21 *H.* 8. *c.* 13. he must have a chaplainship from some of the nobility or other person qualified to keep a chaplain or chaplains.

[505]

But, by the same statute [§ 23.], all doctors and bachelors of divinity, doctors of law, and bachelors of law canon, and every of them, which shall be admitted to any of the said degrees by any of the universities of this realm, and not by grace only, may purchase licence, and take, have, and keep two parsonages or benefices with cure of souls (without any chaplainship.) (4)

First fruits and tenths.

34. By the 1 *El.* *c.* 4. for the restitution of first fruits and tenths to the crown, it is provided, that all grants, immunities, and liberties given to the universities of Cambridge and Oxford, or to any college or hall in either of them, and to the colleges of Eton and Winchester, by king Henry the eighth or any other of the queen's progenitors or predecessors, or by act of parliament, touching the release and discharge of first fruits and tenths, shall be always and remain in their full strength and virtue.

Physicians and surgeons.

35. By the 3 *H.* 8. *c.* 11. For licensing surgeons by the bishop of the diocese; it is provided, that the same shall not be prejudicial to the universities of Oxford or Cambridge, or to any privileges granted to them.

And by the 14 & 15 *H.* 8. *c.* 5. which enacteth, that no person shall be suffered to practise in physic throughout England, until he be examined at London by the president and three elects of the college of physicians; and to have from them letters testimonial of their examination and approbation:——there is an exception, unless he be a graduate of Oxford or Cambridge, which hath accomplished all things for his form, without any grace.

Justices of the peace.

36. By the 5 *G.* 2. *c.* 18. No person shall be a justice of the

(4) A Lambeth degree does not confer this right. *Ante*, 197. *n.* 1.

peace, who hath not 100*l.* a year clear of incumbrances: provided, that this shall not extend to any city or town having justices of the peace within their respective limits; but that in every such city or town, they may be capable to be justices of the peace, in such manner as if this act had not been made: and provided also, that this shall not extend to any of the *heads of colleges or halls* in either of the two universities of Oxford and Cambridge; but that they may be made justices of the peace of and in the several counties of Oxford, Berks, and Cambridge, and the cities and towns within the same, and execute the office thereof as fully and freely in all respects as if this act had not been made.

And by the 7 *G.* 2. *c.* 10. Whereas it hath been customary for the *vice-chancellor* of the university and *mayor* of the town of Cambridge, to be justices of the peace of the county of Cambridge, and it may be inconvenient to have the said qualification of 100*l.* a year extend to them; it is therefore enacted, that the said act shall not extend to deprive the said vice-chancellor of the university or mayor of the town of Cambridge, from being a justice of the peace in the said county. [506]

And by the 18 *Geo.* 2. *c.* 20. for the oath of 100*l.* a year qualification to be made by justices of the peace, it is provided, that this shall not extend to any of the heads of colleges or halls in either of the two universities of Oxford and Cambridge, or to the vice-chancellor of either of the said universities, or to the mayor of the city of Oxford or town of Cambridge; but that they may be and act as justices of the peace of and in the several counties of Oxford, Berks, and Cambridge, and the cities and towns within the same, and execute the office thereof, as fully and freely in all respects, as heretofore they have lawfully used to execute the same, as if this act had not been made.

Members of parliament.

37. By the 9 *Ann. c.* 5. requiring knights of the shire to have 600*l.* a year: and citizens, burgesses, and barons of the cinque ports to have 300*l.* a year; and by the 33 *G.* 2. *c.* 20. requiring oath to be made of such qualification; the members for the two universities are excepted.

Assize of bread.

38. By the 31 *Geo.* 2. *c.* 29. and 3 *G.* 3. *c.* 11. for the due making of bread, and for regulating the price and assize thereof, and to punish persons who shall adulterate meal, flour, or bread; it is provided, that the same shall not extend to prejudice the ancient right or custom of the two universities of Oxford or Cambridge, or either of them, or their clerks of the market, or the practice within the several jurisdictions there used, to set, ascertain, and appoint the assize and weight of all sorts of bread to be sold or exposed to sale within their several jurisdictions; but that they may from time to time set, ascertain, and appoint the assize and weight of all sorts of bread to be sold or exposed to sale, by any

baker or other person whatsoever, within the limits of their several jurisdictions, and may inquire and punish the breach thereof, as fully and freely in all respects as they used to do, as if this act had not been made.

T. 5 *Car.* Case of the university of *Cambridge.* The university claimed by their charter to be clerks of the market, and that they had power by their office to make orders, and to execute them: and they made an order, that no chandler should sell candles for more than 4½*d.* the pound: and because one sold for 5*d.* the pound, they imprisoned him. In this case a prohibition
[507] was granted: for that they could not imprison without course of law; and, as clerks of the market, they had nothing to do but with victuals, which candles are not. *Het.* 145.

Taverns and alehouses.

39. In the close rolls, so ancient as the 3 *Ed.* 1, there is a writ to the mayor and bailiffs of Oxford, to observe the assize of bread and wine, and to set a reasonable price upon victuals, as they are bound by oath to the chancellor and proctors, 3 *Salk.* 383. And by a charter of yet more ancient date, to wit, in the 39 *Hen.* 3. we find the assize of bread and of ale and wine granted to the said university. *Wood's Hist.* and *Ant. Univ. Oxon.*

In the 5 *Rich.* 2. The mayor, bailiffs, and commonalty of Cambridge, were accused in parliament, that in a tumult there, amongst other enormous offences, they had broken up the university treasury, and taken out and burnt sundry the charters and records of the said university: upon which their liberties were seized into the king's hands as forfeited. And afterwards, the king granted to the chancellor and scholars, within the said town of Cambridge and the suburbs thereof, the assize, conusance, and correction of bread, ale, weights, measures, regraters, and forestallers, with the fines and amerciaments of the same, yielding therefore yearly at the exchequer 10*l.* And certain liberties the king after granted to the said mayor and bailiffs, and increased their former fee farm. 4 *Inst.* 228.

By the statute of the 7 *Ed.* 6. *c.* 5. Containing certain regulations about licensing wine taverns, it is provided, that there shall not be at any time above the number of three in Oxford and four in Cambridge. And there is a proviso that the same regulations about the granting of licences shall not in any wise be prejudicial or hurtful to any of the universities of Oxford and Cambridge, or to the chancellor and scholars of the same, or their successors, to impair or take away any of the liberties, privileges, franchises, jurisdictions, powers, and authorities, to them, or any of them, appertaining or belonging; but that they may enjoy the same in such large and ample wise, as though this act had not been made: so alway that there be not any more or greater number of taverns kept or maintained within either of the said towns of Oxford or Cambridge, than may be law-

fully kept or maintained by the provision and intent of this act.

By the 1 *Ja.* c. 9. for restraining of tippling in public houses; [508]
it is provided, that the correction and punishment of such as shall offend against this act within either of the universities, shall be ministered by the governors, magistrates, justices of the peace, or other principal officers there; and that no other within their liberties for any matter concerning this law shall intermeddle.

And by the 4 *Ja.* c. 5. for the punishment of drunkenness; it is provided, that nothing therein shall be prejudicial to either of the two universities; but that the chancellor, masters, and scholars may enjoy all their jurisdictions, rights, privileges, and charters, as heretofore they might have done.

By the 11 & 12 *W.* c. 15. and 12 & 13 *W.* c. 11. § 19. The mayor or other chief officer of every city, town corporate, borough, or market town, shall cause all ale quarts and ale pints brought to them, to be measured and sized with the standard, and then signed, stamped, and marked; —— provided, that nothing therein shall extend to deprive the two universities of this kingdom, or either of them, of their right, privilege, and usage of sizing, signing, stamping, and marking of measures for beer and ale within their respective limits and jurisdictions; but that they may enjoy their said right, privilege, and usage.

T. 1 *An.* *Rush* against *the Chancellor and Scholars of the University of Oxford.* It was moved for a prohibition to a suit in the vice-chancellor's court against certain brewers, for selling ill beer and false measure; and the particular excess of jurisdiction alleged was, the exacting juratory caution; and it was also insisted, that though they have the assise of bread and beer by charter, yet a power to punish by fine, and proceed according to the civil law, cannot be by charter. But by *Holt* chief justice: Before the 14 *Hen.* 8. the university had the jurisdiction of a leet, and exercised it in the vice-chancellor's court; but the charter of the 14 *Hen.* 8. grants them power of trespasses, and that over all persons whatsoever, if a scholar be party. 1 *Salk.* 343.

By the 9 *An.* c. 23., which laid a stamp duty upon ale and wine licences, it is provided, that nothing therein shall extend to prejudice any right which the two universities of Oxford and Cambridge, or either of them, have, or claim to have, to the licensing any taverns, inns, or alehouses, within their several jurisdictions; but that the said universities may from time to time grant licences for any taverns, inns, and alehouses within [509]
their several jurisdictions, subject to the said duties, in a sample manner as they might lawfully have granted the same, if this act had not been made.

By the 10 *Geo.* 2. *c.* 19. It shall not be lawful for the chancellor or vice-chancellor of the university of Oxford, or any other officer of that body, to receive or take, directly or indirectly, any fee, perquisite, gratuity, or reward, for granting such licences as aforesaid; nor shall any sum of money, fee, gratuity, or reward, be hereafter paid to any person or persons for or in respect of such licences, other than such annual payments, in like manner and to the like uses, as have been usual in the university of Cambridge; any law or custom to the contrary notwithstanding. Provided, that nothing in this act shall in any wise be construed to prejudice or confirm any of the liberties, privileges, franchises, jurisdictions, powers, and authorities, appertaining or belonging to the mayor, bailiffs, and commonalty of the city of Oxford, or to any of them; but that they may enjoy the same, as if this act had not been made.

By the 17 *Geo.* 2. *c.* 40. Whereas divers persons have of late taken cellars, vaults, or warehouses, within the university of Oxford and precincts thereof, in which they retail great quantities of wine, not having licence from the chancellor or vice-chancellor of the said university, in violation of the rights of the said university, and in prejudice of his majesty's revenues; and whereas the like offences may be committed within the university of Cambridge and the precincts thereof, by persons selling wine by retail, not being duly licensed by the said university; and whereas the acts of parliament relating to wine licences do not extend to the said universities: it is enacted, that no person shall sell wine by retail, within either of the said universities or the precincts thereof, without licence from the chancellor or vice-chancellor of the university of Oxford, and from the chancellor, masters, and scholars of the university of Cambridge respectively, on pain of forfeiting for every offence 5*l.*, half to the king, and half to the informer; and persons offending against this act may be prosecuted and proceeded against for the said forfeitures in the courts of the chancellors or vice-chancellors respectively, in a summary way, by summoning the party accused; and on appearance, or contempt in not appearing (oath being made of the summons), such courts may examine the matter;
[510] and on confession of the party accused, or oath of one credible witness, may give sentence, and issue their warrant for levying the forfeiture by distress and sale, rendering the overplus; and for want of distress, may commit the offender to the house of correction for one month; and no proceedings herein shall be removed by certiorari, until the party before the allowance thereof shall find two sufficient sureties to become bound to the prosecutor in the sum of 50*l* to prosecute the same with effect within twelve months, and to pay unto him his costs and charges of the removal of such sentence and the proceedings thereon, in case such sentence shall be affirmed.—— Provided, that this shall

not in any wise be construed to prejudice or confirm any of the liberties, privileges, franchises, jurisdictions, powers, and authorities appertaining or belonging to the mayor, bailiffs, and commonalty of the city of Oxford, or to any of them; but that they may enjoy the same, as if this act had not been made.

By the 26 *Geo.* 2. *c.* 31. for licensing alehouses; it is provided, that the same shall not in any wise be prejudicial to the privilege of licensing taverns and other public houses, claimed by the two universities, or either of them; nor to the chancellor, masters, and scholars, or any officers of the same, or their successors; but that they may use and enjoy such privilege as they have heretofore lawfully used and enjoyed.

By the 30 *Geo.* 2. *c.* 19., containing additional duties and other regulations about wine licences, it is provided, that nothing in this act shall be in any wise prejudicial to the privileges of the two universities, nor to the chancellors and scholars of the same; but that they may use and enjoy such privileges as they have heretofore lawfully used and enjoyed.

And by the 32 *Geo.* 2. *c.* 19., explaining and amending the last-mentioned act, it is provided, that nothing in this or any former act, relating to wine licences, shall in any wise be prejudicial to the privileges of the two universities, or to the chancellor or scholars of the same, or their successors; but that they may use and enjoy such privileges as they have heretofore lawfully used and enjoyed: any thing to the contrary thereof in any wise notwithstanding.

Some have doubted, since the acts about justices of the peace licensing alehouses were made, whether the vice-chancellors in the two universities respectively have now a power to regulate and control the selling of ale and other liquors, within their [511] several jurisdictions, as they had before the making of those acts; but upon what those doubts are founded, doth not clearly appear. That they had a privilege by charter to license alehouses, before the act of parliament of the 13 *Eliz.* is unquestionable. That privilege, whether valid or not by charter, was established and made good by that act. From thence, to the 2d year of *Geo.* 2., no alteration by any act was made concerning the power of licensing alehouses. By the act of 2 *Geo.* 2. *c.* 28. it was enacted, that no licence should be granted to keep an alehouse but at a general meeting of the justices for the division, and all licences granted otherwise should be void: but there is a proviso, that nothing therein should extend to alter the method or power of granting licences in *any city or town corporate*. In the act of the 26 *G.* 2. *c.* 31. there are several other regulations; but with a special proviso, that the same should not extend to the universities, and a recognition withal

(as above expressed) of the said privilege of the universities to license taverns and other public houses within their districts. And the like is acknowledged with respect either to taverns or alehouses, or both, by no less than ten other acts of parliament, as is above set forth; as also by two other acts, as here follow under the two next sections: that is to say, the said power is recognized by thirteen acts of parliament.

Carriage of letters.

40. By the 9 *An. c.* 10., requiring that no persons shall carry letters but the postmaster-general or his deputies, there is a proviso [§ 32.], that nothing therein shall extend to either of the universities, but that they may use and enjoy such privileges as heretofore they have lawfully used and enjoyed, and that all letters and other things may be sent or conveyed to or from the said universities, in manner as heretofore hath been used.

Distillers setting up trades.

41. By the 9 *G.* 2. *c.* 23. After the 29th day of September, 1736, any person who hath followed and exercised the art or business of distillation for seven years last past; or hath served, or on the 25th day of March, 1736, was serving an apprenticeship to the same, shall have full liberty and authority to exercise and follow any other trade, art, business, or manufacture, in any city, town, or place in England; any law, charter, grant, custom, or usage to the contrary notwithstanding.

But by the 10 *Geo.* 2. *c.* 19. Whereas since the making the said act, and under colour thereof, persons not licensed by the
[512] chancellor, masters, and scholars of the university of Cambridge, or by the chancellor or vice-chancellor of the university of Oxford, have exercised and followed, or may exercise and follow, in the city of Oxford and town of Cambridge, the trades of vintners or wine sellers, and much evil rule and disorder may be practised in taverns not so licensed, to the great annoyance of the said chancellors, masters, and scholars, and corruption of the youth educated in the said universities; it is enacted, that after Sept. 29. 1737, nothing in the said act contained shall extend to prejudice the right which the chancellor, masters, and scholars of the said university of Cambridge, or the chancellor or vice-chancellor of the said university of Oxford, do claim, of licensing taverns and other public houses within the precincts of either of the said universities; but they may enjoy the said right as fully as if the said act had not been made. Provided, that such distillers as aforesaid, who, since the said 29th day of September, 1736, have exercised or followed in the said town of Cambridge the trades of vintners or wine sellers, without the licence of the chancellor, masters, and scholars, shall have liberty to exercise the said trades there, so as they take out such licences before the 24th day of June next following, paying their proportion for the same of the money usually and an-

nually paid by the vintners or wine sellers now licensed by the said chancellor, masters, and scholars, and upon such terms, and subject to such regulations, conditions, restrictions, and power of revocation, as the said vintners or wine sellers so licensed as aforesaid are subject to.

42. By the 22 *Geo.* 2. *c.* 44. 3 *Geo.* 3. *c.* 8. and 24 *Geo.* 3. *sess.* 2. *c.* 6. (5) soldiers and mariners, [and militia men, and marines or fencibles, who have served for five years from 22d June, 1802, and have been honourably discharged,] who have been employed in the king's service, and have not deserted, may set up such trades as they are apt for, in any town or place within this kingdom: — Provided, that the same shall not in any wise be prejudicial to the privileges of the universities of Cambridge and Oxford, or either of them; or extend to give liberty to any person to set up the trade of a vintner, or to sell any wine or other liquors within the said universities, without licence first had and obtained from the vice-chancellors of the same respectively.

Soldiers setting up trades.

43. In the statute 1 & 2 *P.* & *M.* *c.* 7., which enacteth, that persons dwelling in the country, and not being freemen of cities or towns corporate respectively, shall not sell goods by retail within such city or town corporate, [except in open fairs]; there is a proviso, that nothing therein shall be prejudicial to the liberties and privileges of the universities of Cambridge and Oxford, or either of them.

Persons not free of the city or town selling goods therein.

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44. Whilst the laws for purveyance were in force, it was enacted by the 2 & 3 *P.* & *M.* *c.* 15. that the king's purveyors should not take grain or victuals within five miles of Cambridge or Oxford, unless when the king or queen should be there, or within seven miles thereof. But now, by the 12 *C.* 2. *c.* 24., all purveyance whatsoever is entirely taken away.

Purveyance.

45. By the 10 *G.* 2. *c.* 19. Whereas the letters patent of king *Hen.* 8. made and granted to the chancellor and scholars of the university of Oxford, bearing date the first day of April, in the fourteenth year of his reign; and the letters patent of queen Elizabeth, made and granted to the chancellor, masters, and scholars of the university of Cambridge, bearing date the twenty-fifth day of April, in the third year of her reign; and also all other letters patent by any of her progenitors or predecessors, made to either of the corporated bodies of the said universities; and all manner of liberties, franchises, immunities, quietances, privileges, view of frankpledge, law days, and other things whatsoever they were, which either of the said corporated bodies of the said universities had held, occupied, or enjoyed, or of right

Stage plays.

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(5) All Exp. as is 42 *G.* 3. *c.* 69. in effect. The same provisions exist in 56 *G.* 3. *c.* 67.

ought to have used, occupied, and enjoyed; were by authority of parliament, in the thirteenth year of her reign, confirmed to the chancellor, masters, and scholars of either of the said universities, and their successors; and whereas doubts have arisen, or may arise, whether by any of the said letters patent, liberties, franchises, immunities, or privileges, or by any subsequent charter or charters, or by the laws and statutes of this realm, the chancellor of either of the said universities, or the vice-chancellor thereof, or his deputy, or any other person, be sufficiently empowered to correct, restrain, or suppress common players of interludes, settled, residing, or inhabiting within the precincts of either of the said universities, and not wandering abroad; and whereas the erection of any playhouse within the precincts of either of the said universities, or places adjacent, may be attended with great inconveniences; it is enacted, that all persons whatsoever, who shall for gain, in any playhouse, booth, or otherwise, exhibit any stage play, interlude, shew, opera, or other theatrical or dramatical performance, or act any part, or assist therein, within the precincts of either the said universities, or within five miles of the city of Oxford or town of Cambridge, shall be [514] deemed rogues and vagabonds: and it shall be lawful for the chancellor of either of the said universities, or the vice-chancellor thereof, or his deputy respectively, to commit any such person to any house of correction within either of the counties of Cambridge or Oxford respectively, there to be kept to hard labour for the space of one month; or to the common gaol of the city or county of Oxford, or town or county of Cambridge, there to remain without bail or mainprize for the like space of one month; any licence of the chancellor, masters, and scholars of either of the said universities, or any thing in any statute, law, custom, charter, or privilege to the contrary notwithstanding.

Militia. 46. By the militia act of 42 G. 3. *c.* 90. § 43. No person, being a member of the university, shall serve personally, or provide a substitute to serve in the militia.

Land tax. 47. By the 38 G. 3. *c.* 5. § 25, 26. it is provided, that the same shall not extend to charge any college or hall in either of the two universities of Oxford or Cambridge; or the colleges of Windsor, Eton, Winton, or Westminster; or the college of Bromley; for or in respect of the sites of the said colleges or halls, or any of the buildings within the walls or limits thereof; or any master, fellow, or scholar, or exhibitioner of any such college or hall, or any masters or ushers of any school; for or in respect of any stipend, wages, rents, profits, or exhibitions whatsoever, arising or growing due to them, in respect of the said several places or employments, in the said universities, colleges, or schools; or to charge any of the houses or lands, which on or before Mar. 25. 1693, did belong to the sites of any college or

hall. Provided, that nothing herein shall be construed or taken to discharge any tenant of any of the houses or lands belonging to the said colleges, halls, or schools, who by their leases or other contracts are obliged to pay all rates, taxes, and impositions whatsoever; but that they shall be rated and pay all such rates, taxes, and impositions. Provided also, that all such lands, revenues, or rents, settled to any charitable or pious use, as were assessed in the fourth year of *Will. & Mary*, shall be liable to be charged; and that no other lands, tenements, or hereditaments, revenues, or rents whatsoever, then settled to any charitable or pious uses, as aforesaid, shall be charged.

[By the 42 *G.* 3. *c.* 116. (For redemption and sale of the land-tax) *Colleges*, and *other patron of livings*, are empowered to contract for the redemption of the land tax charged upon the glebe lands, tithes, or other profits of any living or livings in their patronage, (where the incumbents have not redeemed the same) upon the same terms, and with the same benefits and advantages, as the incumbents of such livings might have done. § 17.

And such colleges, &c. may provide for the redemption of the land tax charged on livings belonging to them, either by sale of any lands, tenements, or hereditaments belonging to them, or by the grant of any rent-charge which they might lawfully make. And they shall be entitled to an equivalent rent-charge out of the living; unless they declare in writing under their common seal, at the time of presenting or nominating a clerk to such living, that such rent-charge shall be suspended during his incumbency. But such suspension shall not prejudice the right of the college to recover such rent-charge after the next or any future avoidance; and any declaration, made by such college at the time of redeeming the land tax, shall be as available during the incumbency of the then rector, vicar, or curate, as if it had been made at the time of his being preferred to such living.

78. [*See infra*, **Land Tax.**] (*m*)

48. By the 48 *G.* 3. *c.* 55. *sch.* (A), Rule viii. Every distinct chamber in a college or hall in the universities, shall pay the duties upon houses or windows, as if it was one entire house. **Duty upon Houses and Windows.**

(*m*) *All Souls' College, Oxford*, v. *Costar and others.* In this case it was held, that the buildings of a college, taken into and made part of the college between the passing of the first land-tax act, and the act which made that tax perpetual, were exempted from the land-tax. But where a college, soon after the passing of the first land-tax act, purchased land of a parish under a private act of parliament, which provided that the college should pay all taxes which the premises then were or hereafter should be subject to, such lands were still liable to the land tax. 3 *Bos. & Pul.* 635.

Duty upon offices and pensions.

49. By the 32 G.2. c.33. explaining a former act, *viz.* 31 G.2. c. 22., which imposeth a duty upon offices and pensions; it is provided, that nothing in the said act of the 32 G. 2. c. 33. shall extend to charge any offices or employments in either of the two universities.——But there is no proviso for exempting offices in the universities from the duties charged by the said former act of the 3 G. 2. c. 22.

Highways.

50. By the 18 *El.* c. 20. and 35 *El.* c. 7. divers regulations were made for repairing the highways within one mile of the city of Oxford, under the controul of the vice-chancellor and mayor, with other justices of the university and city; which being found insufficient, an act was passed in the 11 G.3. c.19. for rendering the same more effectual, and for causing the ways commonly called the mile ways to be repaired; for making a commodious entrance through the parish of St. Clement; for rebuilding or repairing Magdalen bridge; for making commodious roads from the said bridge through the university and city, and the avenues leading thereto; for cleansing and lighting the streets, lanes, and places within the said university and city, and the suburbs thereof, and the said parish of St. Clement; for removing nuisances and annoyances therefrom, and preventing the like for the future; for impowering colleges and corporations to aliene their estates there; and for removing, holding, and regulating markets within the said city.

Duties on paper.

51. [For the encouragement of learning, the 43 G. 3. c. 69. allows a drawback of the whole duty for all paper made in Great Britain, of the first class or denomination, used in printing books in the Latin, Greek, oriental, or northern languages, or in printing Bibles, Testaments, Psalm books, &c. within the universities, by permission of the vice-chancellor. And, in order to obtain this allowance, the chief manager of the press, in each of the universities, shall make oath in writing before the vice-chancellor, expressing the quantity of paper used, and the account of the duties; which oath being certified and produced to the commissioners of the treasury, they are to cause the commissioners of excise to make payment.]

Commandments to be set up at the east end of the Church. See **Church.**

END OF THE FIRST VOLUME.

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